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91-1706

Supreme Court, U.S.
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No. -----

In The
Supreme Court of the United States
April Term, 1992

Joseph Smith, *et al.*,

Petitioners,

v.

Marvin K. Hammon, *et al.*, and
Sharon Pratt Kelly, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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27 April 1992

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QUESTION PRESENTED

Whether retired firefighters were improperly excluded from a class action settlement award which compensated class members for identical past racial discrimination.

PARTIES TO THE PROCEEDINGS BELOW

The following parties appeared below:

Plaintiff: Marvin K. Hammon, et al.

Defendants: Marion S. Barry, Jr., et al.

Objectors: Joseph L. Smith, et al.

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IN THE SUPREME COURT OF THE UNITED STATES
April Term, 1992

Joseph L. Smith, *et al.*

Petitioners,

v.

Marvin K. Hammon, *et al.*, and
Sharon Pratt Kelly, *et al.*

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Joseph Smith, *et al.*[*] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on January 28, 1992.

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[*] Petitioner Joseph L. Smith has expressed to petitioners' counsel his intention to withdraw as named representative of the excluded class.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit en banc is unreported and is reproduced in the Appendix. The panel opinion of the Court of Appeals is unreported and is reproduced in the Appendix. The opinion of the United States District Court for the District of Columbia is reported at 752 F.Supp. 1087 (D.D.C. 1990) and is reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals en banc was entered on 28 January 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a)(1) and (2) (1976), providing:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any

> individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 706 of Title VII, as amended by Section 4(a) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. Section 2000e-5(e), providing:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * * except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * * such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF CASE

On 29 October 1980, plaintiff Theodore O. Holmes, President of the Progressive Firefighters Association filed charges of discrimination with the United States (hereafter U. S.), Equal Employment Opportunity Commission (EEOC) and with the District of Columbia Office of Human Rights (OHR), on behalf of himself and the Association, against the department, City Administrator and the Director of Personnel. Mr. Holmes alleged that defendants engaged and continued to engage, in racially discriminatory employment and promotion practices in the operation of the department. A second charge of discrimination was similarly filed on 4 March 1981 asserting claims that the department failed to hire minority persons because of race.

In March 1984 plaintiffs Marvin K. Hammon, *et al.*, filed a class action lawsuit against the Mayor of the District of Columbia, the District of Columbia (hereinafter D.C.)

Office of Personnel, and the Fire Department. Local 36, International Association of Fire Fighters, was granted leave to intervene in the matter.

The Hammon Class alleged that the department discriminated against past and present firefighters in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1983. Further the Hammon class sought compensation to settle claims for racial discrimination and injuries that resulted therefrom.

Following extensive litigation, on 20 August 1990, the parties signed a settlement agreement recognizing and redressing all claims of past discrimination against Black employees and/or applicants for employment with the department which had been or which might have been made. The proposed agreement provided for compensatory damages and promotions for some class members, and development of nondiscriminatory promotion tests. A key element of the

settlement agreement was the District of Columbia Government's (hereafter "D.C.'s" or "the City's") agreement to pay the Hammon Class a sum of $3,500,000. Of that amount, $2,400,000 was set aside to redress pre-1980 claims of prior racial discrimination.

Under the settlement agreement signed by all parties, the compensation award was specifically allocated as follows: (a) 70% of the total amount or $1,680,000 for years 1962-1968, (b) 20% of the total amount or $480,000 for years 1969-1972, and (c) 10% or $240,000 for years 1973-1979; (2) no more than $1 million dollars compensation for post-1980 discrimination in hiring claims, to be divided among all members of the Hammon Class who completed the 1980 hiring test and either were never hired or were hired after the average date on which white test-takers were hired (1 July 1982); and (3) $100,000 as compensation for individual class members who contributed to the litigation by rendering

services on their own time or who bore "special burdens... during this litigation." Special Masters Proposed Final Agreement Among Hammon Plaintiffs, Byrne Plaintiffs, and Local 36 and the City, 20 August 1990.

Firefighters who retired before 1 January 1980 were barred from participation in the settlement award.[1] The City waived any potential limitations, however, as to those firefighters who remained employed as of the 1 January 1980 cut off date.[2] Thereafter, the defendant signed a consent decree which counsel for the class refused to sign.

On 23 October 1990, Joseph L. Smith, *et al.*, on

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[1] Joseph L. Smith et al. represent a group of black firefighters who retired from the D.C. fire department prior to 1 January 1980. The group comprises fifty-two (52) firefighters who collectively provided in excess of 1,350 years of service during the worst period discrimination in the department.

[2] Essentially, the District defendants waived the limitation in Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(g), which limits the award of back pay to two years prior to the filing of a charge, as to all those persons who arguably could have filed timely charges under Section 706(c) and (e) of title VII, 42 U.S.C. § 2000(e)-5(c) and (e), at the time that the charges on which this action was based were filed in October, 1980.

behalf of thirty four (34) retired firefighters, filed objections to the proposed settlement, requesting that it be denied.

On 6 November 1990, the Honorable Charles R. Richey approved the 20 August 1990 settlement agreement, entered a decree to effectuate it and rendered a written opinion concluding that it was entirely appropriate to exclude the pre-1980 firefighters from the settlement because their claims could have been time barred by the statute of limitations. The trial court adopted the settlement decree excluding petitioners from the class stating:

> "...[A]though the court feels great sympathy and admiration for the older retired firefighters who probably suffered the most (enduring that period when discrimination in the fire department was institutionalized and most extreme), the Court must evaluate the strengths and weaknesses of the class members claims within the framework of their likelihood of establishing liability at trial." Hammon, et al. v. Barry, et al., No. 84-903(CRR) App. § C (D.D.C. 1990) at 15-16. (Emphasis supplied.)

He also stated:

> ...[t]hat the Special Master and counsel for all the

> parties chose this cut off date only after extensive discussions and careful consideration of the relative weakness of these retirees' claims due to the city's potentially devastating statute-of-limitations defense. The City made very clear to everyone involved in this lawsuit that, if settlement talks were to break down, the city would assert and vigorously litigate a statute-of-limitations defense since the discrimination occurred,if at all, over four years before the filing of this lawsuit. However, to avoid litigating this issue and having to determine precisely when acts occurred on a case-by-case basis for the numerous members of the Hammon class, the City agreed to waive its statute-of-limitations defense, and counsel for all parties (including the Hammon Class' attorney) ... agreed that it was highly likely that claims by any firefighter who retired before January 1, 1980, would be time barred. Id. at 14-15. (Emphasis supplied.)

He stated further:

> In view of the likelihood that the retirees' claims would be time barred and the fact that counsel for all the parties (including the Hammon plaintiffs' counsel when signing the settlement agreement) and the Special Master all agree that the January 1, 1980 cut-off date was proper, this Court holds that the January 1, 1980 cut-off date was proper, the Court holds that the Settlement Agreement is fair, adequate, and reasonable and must be approved over the retirees' objections." Id. at 16. (Emphasis supplied)

On 6 December 1990 Joseph L. Smith, *et al.* filed a

notice of appeal from the order of the U.S. District Court entered on 6 November 1990, which excluded appellants from membership in the Hammon class and participation in the settlement award on the basis of an arbitrary and capricious cut off date of 1 January 1980. On 13 June 1991, Appellees Marvin Hammon, *et al.*, Sharon Pratt Kelly, *et al.* (hereafter "the City"), and Local 36, International Association of Firefighters, jointly moved to dismiss the appeal of Joseph L. Smith, or in the alternative, moved for summary affirmance. In this motion, the Hammon class and the City alleged that claims of discrimination of the pre-1980 black firefighters were legitimately excluded because they were time barred by the statute-of-limitations. A panel of the U.S. Court of Appeals reviewed these issues in response to Appellees' joint motion and granted that motion adopting exclusively those reasons stated by the lower court in its 6 November 1991 opinion. Whereupon Joseph L. Smith, *et al.*

filed a Suggestion for Rehearing En Banc to the United States Court of Appeals for the District of Columbia Circuit, which on 28 January 1992 was denied without the taking of a vote thereon.

On 28 February 1992, Defendant's counsel filed a response to a letter of 5 February 1992 from Nathan R. Queen regarding the Special Master. Hammon, et al. v. Barry, et al., Nos. 84-903(CRR) and 85-782(CRR), App. § J (D.D.C. 1992).

On March 28, 1992, counsel for Joseph L. Smith, *et al.*, filed a motion to vacate the settlement order based thereupon. On March 28, 1992, the District Court denied said motion. Hammon, et al. v. Barry, et al., Nos. 84-903(CRR) and 85-782(CRR), App. § K (D.D.C. 1992).

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS A UNIQUE ISSUE REGARDING SETTLEMENT OF TITLE VII CLASS ACTIONS AND NEGOTIATED ASSERTION OF THE STATUTE OF LIMITATIONS REGARDING IDENTICAL ACTS OF PAST RACIAL DISCRIMINATION.

Given the facts of the immediate case, the United States Court of Appeals' application of and reliance on Laffey v. Northwest Airlines, Inc. 587 F.2d 475, (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978); Terry v. Bridgeport Brass Co., 519 F.2d 806, (7th Cir. 1975); and Olson v Rembrandt Printing Co. 511 F.2d 1228 (1975) to uphold the trial court decision is erroneous. Unlike the Laffey line of cases, this case involves a settlement process in which the statute of limitations was arbitrarily applied. As a result of settlement negotiations, the parties agreed (1) that the City would waive the statute of limitations and applicable back pay limitations relative to Black firefighters employed on January 1, 1980; (2) that the city would assert the statute

of limitations to exclude from the class retired Black firefighters not employed on January 1, 1980; and (3) to a $3,500,000 settlement amount and formula upon which certain class members were compensated for acts of past racial discrimination. This formula (based on three distinct time periods: 1962-1968, 1969-1972, and 1973-1979) results in the peculiar compensation of certain class members while excluding retirees who suffered identical past racial discrimination. The parties' negotiated and selective assertion of the statute of limitations to exclude the pre-1980 retirees triggers a legal analysis beyond the standard application of the statute of limitations and requires the court to carefully evaluate the attending circumstances of the settlement process.

Petitioners seek to challenge the selective waiver and assertion of the statute of limitations resulting in their exclusion on three grounds: first, the process leading to the

settlement and exclusion was unreasonable, inadequate and unfair; second, class counsel failed to provide adequate representation to the entire class; and third, the resulting agreement was inherently inequitable.

The Court's crucial role in reviewing and approving a class action settlement agreement is to protect class members whose rights may not have been given due regard by the negotiating parties. Fed. Rules Civ. Proc. rule 23(e), 28 U.S.C.A. Before approving a class action settlement, the Court must reach a reasoned judgment that the settlement is " fair, reasonable and adequate to *all* concerned parties." Ficalora v. Lockheed California Co. 751 F.2d 995 (9th Cir. 1985) quoting Officers For Justice 668 F.2d at 625 . Under the facts of this case, the court below should have determined whether the process surrounding petitioners exclusion was fair, reasonable and adequate prior to upholding the Lower Court's adoption of the settlement agreement. Hindered by

its reliance on Laffey and Olson, however, the lower court did not focus sufficiently on the questionable settlement process herein.

Exclusion of the pre-1980 retirees undermined the expressed purpose of the settlement agreement to "provide remedies for any vestiges of discrimination which may have adversely affected the members of the Hammon class" and, more specifically, compensate victims of past discrimination occurring between 1962 and 1979. Hammon, et al. v. Barry, et al., Civ Nos. 84-903 and 85-782, app. § L, Consent Decree (D.D.C. October 1990). Given the parties expressed interest in proving damages for past discrimination, there was not a single, substantiated factual reason noted below for excluding the pre-1980 retirees from the settlement award. Their exclusion served to bar them from sharing in any recovery despite the fact that they too "suffered the most (enduring that period when discrimination in the Fire

Department was institutionalized and at its most extreme)." Hammon, et al. and Smith, et al. v. Kelly, 752 F. Supp. 1087, app. § A (D.D.C. 1990). The settlement agreement capriciously creates two classes of firefighters who suffered racial discrimination pre-1980. The conspicuous inconsistency between the purpose of the settlement agreement and exclusion of pre-1980 retirees raises more than an eyebrow as to whether the settlement agreement was proper.

It is well settled that absent members of a class have a right to adequate representation of counsel. Newburg on Class Actions, §3.42. (2ed. 1985). The court also has a duty to assume protection of the rights and interests of absent class members in all phases of class action litigation. In re Beef Indus Antitrust Litigation, 607 F. 167 (5th Cir. 1979), cert. denied, 452 U.S. 905 (1981) citing Newburg on Class Actions (Feb. Supp. 1984). In the immediate case very

serious questions regarding representation of absent class members are raised by the conduct of class counsel, including potential conflicts of interest and appearances of impropriety. In one instance, the Special Master inquired of class counsel as to whether she sought contact with a named defendant (the then Mayor of The District of Columbia) despite knowledge that he was represented by counsel and further, that counsel had previously advised her that such communication was improper. Hammon, et al. v. Barry, Civ. Nos. 84-903 and 85-782, app. § F, Pre-Fairness Hearing Report of The Special Master, (D.D.C. Oct 22, 1990) at page 3.

In a letter to the District Court's attention, dated February 28, 1992, regarding Class counsel's handling of this case, Counsel for the City stated:

> Defendants note that they offered 4.5 million dollars to separately settle this case with the Hammon plaintiffs (without the involvement of the union). The defendants' offer was rejected solely because

> defendants would not sign an agreement specifying that the Hammon plaintiffs' counsel, Ms. Burt, Esq., would get a pre-determined fee (e.g., one proposal required payment of attorney's fees in excess of one million dollars). In response, the defendants offered to keep the 4.5 million dollar settlement offer on the table with the court being allowed to resolve the issue of attorney's fees. The Hammon plaintiffs' counsel rejected that offer and again insisted that the 4.5 million dollar offer be accompanied by an agreement paying counsel more than one million dollars in attorney's fees. The defendant balked at such a ridiculous maneuver (sic) and withdrew their settlement offer. Later, when settlement discussions were renewed, defendants negotiated a settlement for 3.5 million. Hammon, et al. v. Barry, et al., Civ Nos. 84-903 and 85-782, app. § J, Defendant's Response to letter of February 5, 1992 (D.D.C. February 28, 1992).

The agreement to exclude the retirees from the class effectively increased the amount of damages awarded to post-1980 class members. A statement by class counsel in a report to the court subsequent to the settlement illuminates the conflict of interest herein.

> The Hammon plaintiffs do not advocate that these objectors take under the settlement agreement's monetary fund because one of the reasons they were excluded was to provide an adequate monetary

> amount to members of the class after the monetary fund was reduced. We do not object to the fairness of the settlement monetary fund at 3.5 million and the formulae associated therewith for the class members who are included in said settlement ... Hammon Plaintiff's Post Fairness Hearing Report To The Court. Hammon, et al. v. Barry, et al., Civ. Nos. 84-903 and 85-782, app. § D, Plaintiffs Post-Fairness Hearing report (D.D.C. October 3, 1990).

By her own admission, class counsel agreed to exclude pre-1980 retirees in order to benefit remaining class members. This is a per se conflict of interest.

Further, the Special Master has noted other potential conflicts. A report filed on February 21, 1992 states that Class counsel was not only in possession of powers of attorney from various class members, but that she may have requested the same from numerous class members. Hammon, et al. v. Barry, et al., Civ. Nos. 84-903 and 85-782, app. § M, Special Master's Report on Potential Conflicts Of Interest (D.D.C. February 21, 1992) He then queries: "Is counsel for the class in a conflict when she has powers of

attorney on behalf of some particular individuals and these individuals are competing for limited funds against others who have chosen not to give a power of attorney?" Id. Cumulatively, these allegations on their face are startling and raise serious ethical issues regarding class counsel's adequate representation of the entire class; more critically it besmirches the fairness of the settlement negotiation process.

In class action settlement negotiations "[t]he court does have the duty to see to it that the administration of justice has the appearance of propriety as well as being so in fact." Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977). Given the facts of this case, the District Court, prior to adopting the settlement agreement, should have more fully investigated the settlement negotiation process and counsel's representation of the class.

In reaching a compromise in settlement of a class action, the attorney representing the plaintiff class is placed

in a particularly difficult position because he or she bears responsibility both towards the class as a whole and toward individual class members. Ficalora v. Lockheed California Co., 751 F.2d 995 (9th Cir. 1985) citing Mandujano v. Basic Vegetable Prods. Inc. 541 F.2d 832, 834-35 (9th Cir. 1976). The attorney also can be forced into a situation in which his or her own fee can be enlarged or reduced by concessions made by the class or members of the class in order to achieve settlement. Id. at 997. Counsel failed miserably to properly represent the interests of absentee class members. The District court, either directly or through the Special Master, was made aware of counsel's actions. It nonetheless failed to take appropriate steps to insure class counsel's accountability to the entire class.

The settlement agreement is brutally inequitable. In the Preliminary Statement of the Consent Decree, "the parties agree that remedial actions and practices required or

permitted by this Decree shall not constitute unlawful discrimination under any law, regulation, or constitutional provision." Hammon, et al. v. Barry, et al., Civ Nos. 84-903 and 85-782, app. § L, Consent Decree (D.D.C. October 1990). It may be that the cut-off date which excluded black retired firefighters further perpetuates discrimination against this group on the basis of race and age. In any event, the agreement's different treatment of groups which suffered identical racial discrimination is inequitable.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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27 April 1992

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903 (CRR)

MARVIN K. HAMMON, *et al.*, and
JOSEPH L. SMITH, *et al.*,
Plaintiffs

v.

SHARON PRATT KELLY, *et al.*,
Defendants

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

[Decided and Filed November 6, 1990]

On August 20, 1990 the three parties to the above-captioned class action lawsuit--the class of black-firefighters ("Hammon plaintiffs" or "Hammon class"), the class of white firefighters ("Byrne plaintiffs" or "Byrne class"), and the District of Columbia defendant ("the

City")--executed a Settlement Agreement through duly authorized counsel. See Agreement, Appendix I. The two-part Settlement Agreement clearly states that it is binding on all parties, that it resolves all claims raised in this litigation, and that it sets forth all essential terms of the settlement. Moreover, the Settlement Agreement contemplated that the parties would work with Special Master Stephen Saltzburg to provide the Court with a detailed decree to implement the terms of the Settlement Agreement. Pursuant to Fed. R. Civ. P. 23 (e), the Court must now decide whether to approve the Settlement Agreement as a fair, adequate, and reasonable resolution of the parties' claims. Having carefully considered all of the pleadings submitted by the parties, the Special Master's Reports, all of the objections submitted in writing or made orally at the October 23, 1990 Fairness Hearing, the entire record herein, and the underlying law, the Court will approve the parties'

August 20, 1990 Settlement Agreement. Furthermore, the Court will conditionally enter its own decree, which adopts--with some modifications--the consent decree proposed by the Special Master, the Byrne plaintiffs and the City but which shall only go into effect only after the parties have had one final opportunity to submit a consent decree signed by all three parties to this litigation.

I. Factual Background

The parties' acrimonious dispute, involving charges of discrimination and reverse discrimination, has been burning for over six years. The direct result of this dispute is that the District of Columbia Fire Department administered its last promotional examination (usually given every two years) in 1984 and has made no promotions since 1986.

The Hammon plaintiffs' part of this has been pending before the Court since March 1984, and the Byrne plaintiffs' part of this lawsuit has been pending since March 1985. In

ruling on an affirmative action plan that the City had adopted in response to recommendations by a bearing examiner at the administrative level, the Court approved the affirmative action plan in part, holding "that the hiring aspects of the plan satisfy the minimal requirements of Title VII and the Constitution, but that the promotion aspects cannot survive Title VII scrutiny." Hammon v. Barry, 606 F. Supp. 2082, 2084 (D.D.C. 1985). However, addressing only the hiring part of the affirmative action plan on appeal, a panel majority reversed and struck-down the plan's hiring aspects. Hammon v. Barry, 813 F.2d 412 (D.C. Cir.), reh'g denied, 826 F.2d 73 (D.C. Cir. 1987), cert. denied, 486 U.S. 1036 (1988).

Since the Court of Appeals' decision and remand, the parties have tried, with this Court's assistance, to settle this case without proceeding to trial. To facilitate these settlement negotiations and assist the parties in reaching an

agreement, the Court, pursuant to Fed. R. Civ. P. 53, appointed Stephen Saltzburg as Special Master in April 1990, and each of the parties agreed to pay one-third of his fees and expenses. The considerable efforts of the parties and the Special Master culminated in a draft of a proposed Settlement Agreement. Then, the Court met with counsel for all the parties to tell them that it was their decision whether to sign the proposed Settlement Agreement and that the Court had neither read the proposal nor decided whether to approve it in the event the parties did sign it.

The Hammon plaintiffs were informed of the proposed Settlement Agreement and, after considering it for some time, the Hammon plaintiffs, by class counsel Joan Burt, signed the Settlement Agreement. At a subsequent status conference with the Court, Dovey J. Roundtree (who entered her appearance during February 1989 as co-counsel for the Hammon plaintiffs) independently registered her

approval of the Settlement Agreement. Having been notified of and having considered the Special Master's proposal, the Byrne plaintiffs, by class counsel George Cohen, also signed the Settlement Agreement, which was subsequently voted upon and ratified by Local 36. Finally, the City took the proposal under advisement, and, by Corporation Counsel Dr. Herbert 0. Reid, Sr., the City also signed the Settlement Agreement.

Thus, on August 20, 1990, the parties all executed a Settlement Agreement that is final and binding on all the parties and that resolves any and all claims of discrimination--whether based upon the constitution or federal or local statutes--raised by the classes and the individual members at any point during this lawsuit. Although the Settlement Agreement is one integrated document, it contains two parts to reflect the different claims of the Hammon and Byrne plaintiffs: Part A (signed by the Hammon plaintiffs and the

City) addresses all of the lawsuit's claims involving hiring and vestiges of discrimination but not the dispute over future promotions and Part B (signed by the Hammon plaintiffs, the Byrne plaintiffs, and the City) addresses the future promotions issue. The Settlement Agreement explicitly states that it "sets forth all essential terms of the settlement;" Agreement, Appendix I, Part A ¶ 1, Part B ¶ I (emphasis added), and that "Parts A and B together resolve all claims and bind all class members with respect to all claims of discrimination as of the date of this agreement," id. Part A ¶ 21 (emphasis added); see id. Part B ¶ 2.

Without going into an overly detailed description of the Settlement Agreement, which speaks for itself, the Court notes that it provides for various forms of relief. The Hammon plaintiffs will receive a $ 3.5 million lump-sum payment from the City, which does not include attorneys fees and which will be divided among the class members based

upon how many years each firefighter worked as well as other criteria. See id. Part A ¶¶ 4,8-17. Moreover, the Settlement Agreement provides for: about 180 immediate promotions (based upon an attached schedule) to fill most outstanding vacancies; the creation of a new (fourth) platoon of firefighters with many new Sergeant, Lieutenant, and Captain positions; the development and administration of fair promotional examinations to fill some outstanding and all future vacancies. See id. Part B ¶ ¶ 5-13. In return for the foregoing, the City avoids any finding of liability and enhances the public safety by improving Fire Department working conditions and morale and making long overdue promotions. Finally, all parties avoid the risks and costs of proceeding to trial.

In short, while each of the parties benefits from the Settlement Agreement, none of the parties has obtained a perfect result for itself. As is common when a case settles

rather than proceeding to trial, the Settlement Agreement contains various trade-offs and concessions that the parties agreed to when faced with the prospects of litigating and perhaps losing some or all aspects of this case.

There is nothing on the record before the Court to indicate that any party attempted to modify or change the Settlement Agreement between the date of its signing on August 20, 1990 until the Fairness Hearing on October 23, 1990. Moreover, at the Fairness Bearing itself, counsel for all the parties reaffirmed the Settlement Agreement. Only after the Fairness Bearing and after the City and the Byrne plaintiffs had already signed the Proposed Consent Decree did it become clear that Joan Burt, counsel for the Hammon plaintiffs, was refusing to sign the Proposed Consent Decree--although she had several times stated on the record that she would, see October 16, 1990 Meeting with Special Master Tr. at 6, 12, 23--and was even attempting to renege

on the essential terms of the Settlement Agreement.

The Settlement Agreement envisioned that the parties would work with the Special Master to develop a decree for the Court's approval, see Agreement, Appendix I, Part A ¶ 1, but the Settlement Agreement nowhere indicates that it could be implemented only by a consent decree signed by all the parties: In fact, the Special Master has stated to the Court that he purposely did not use the term "consent decree" when drafting the Settlement Agreement, in light of the many previous instances throughout this litigation in which the parties were unable to cooperate. Thus, the record is clear that the parties originally agreed that the Court could enter its own decree in accordance with the essential terms contained in the Settlement Agreement in the event that the parties failed to agree upon one consent decree.

Since the date the Settlement Agreement was signed by all of the parties, the parties have worked with the Special

Master and the Test Development Committee ("TDC") to develop promotional examinations as required by the Settlement Agreement.[1] The first promotional test is scheduled for December 1990, and it will provide hundreds of firefighters, who have been studying for weeks, with their first opportunity for a promotion.

The parties and the Special Master notified the class members of the October 23, 1990 Fairness Rearing in various ways. All current Fire Department members received personal notice, and retired firefighters and others who requested notice received personal notice. In addition, class members received publication notice in five different publications. See Notices, Appendix III. Judging by the written objections the Court received pursuant to this notice procedure and the responses at the Fairness Hearing, the

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[1] The TDC was established earlier in this litigation by agreement of all the parties and has been funded by the City.

Court is satisfied that the various notices succeeded in alerting the class members to the proceedings.

In anticipation of the Fairness Hearing, the Special Master met with counsel for all the parties on October 26 and 27, 1990 to discuss the class members' written objections and formulate responses. The record is clear that all counsel present agreed with and supported the Special Masters' proposed responses to the class members' objections, see October 17, 1990 meeting with Special Master Tr. at 21-55. Before the Fairness Hearing, no counsel for any of the parties requested the Special Master to suggest to the Court that any of the class members' objections had any merit, except for one minor modification (agreed to by all the parties) enabling the heirs or estates of deceased firefighters, who otherwise would have been eligible to share in the settlement fund to submit claims. Nor did counsel for any of the parties argue at the Fairness Hearing that any of the class

members objections should prevent Court approval of the Settlement Agreement.

II. Analysis

A. Jurisdiction Despite Notice of Appeal

A threshold issue is whether this Court continues to have jurisdiction to proceed in this matter in light of the Hammon plaintiffs' Notice of Appeal from the Court's September 12, 1990 order extending the period of the Special Master's reference and responsibility. The Hammon plaintiffs have not filed a motion for a stay pending appeal with this Court nor have they ever indicated on the record, orally or in writing, that this Court should hold these proceedings in abeyance until their appeal is resolved. Moreover, as far as the Court is aware, the Hammon plaintiffs have filed only a Notice of Appeal with the Court and, to the Court's knowledge, have done nothing further about pressing their appeal at this time. That is not

surprising since the use of special masters has been approved "in a wide variety of remedial contexts including) cases . . remedying various . . . statutory or constitutional violations." Malderman v. Pennburst State School & Hosp., 612 F.2d 84, 111 (3d Cir. 1979) (en banc), rev'd on other grounds, 451 U.S. 1 (1981).

In any event, the Notice of Appeal does not divest this Court of jurisdiction because the order from which the Hammon plaintiffs seek to appeal is an interlocutory, non-appealable order. See 9 Wright & Miller, Federal Practice and Procedure § 2615, at 813 ("An order of reference to a master is interlocutory and not appealable."). Instead of allowing the Hammon plaintiffs to willfully deprive this Court of jurisdiction, "thus bringing [these] proceedings to a standstill while a non-appealable ruling vends its way through the appellate process," Venen v. Sweet, 758 F.2d 117, 121 (3d Cir. 1985), the Court will

"disregard the notice of appeal [from a non-appealable order] and proceed with the case," Hammerman v. Peacock, 623 F. Supp.719, 721 (D.D.C. 1985) (citing 9 Moore's Federal Practice ¶ 203.11, at 3-52 (citing cases)); see also SEC v. American Bd. of Trade, Inc., 829 F.2d 341, 344 (2d Cir. 1987), cert. denied, 486 U.S. 1034 (1988); United States v. Bastanipour, 697 F.2d 170, 173 (7th Cir. 1982), cert. denied, 460 U.S. 1091 (1983).

B. Number of Objecting Class Members

Turning to the merits of whether the Court should approve the Settlement Agreement as a fair resolution of this case, the Court first examines the number of the objections received. Although approximately 85 individuals objected to some aspect of the Settlement Agreement,[2] that is a relatively low level of dissatisfaction considering that the

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[2] The Court received about 108 written submissions but about 22 of those submissions were requests for claims forms.

Hammon and Byrne classes comprise at least 2,000 individuals.[3] Moreover, the number of objectors is somewhat misleading because that figure includes about 33 members of the Fire prevention unit who made essentially the same objection based on the absence of a separate test and insufficient pay and whose concerns are discussed in more detail below. See infra Section G. Thus, as best as the Court can determine, it appears that less than five percent (85 out of 2,000) of the class members objected, and that figure drops to less than three percent (52 out of 2,000) if the Fire Prevention common objection is put to one side. Compare Cotton v. Hinton, 559 F.2d 1326, 1333 (5th Cir.

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[3] According to data gathered by the Special Master with the help of the parties, there are currently about 2,300 firefighters represented by Local 36 who would be affected by the Settlement Agreement as members of either the Hammon or the Byrne classes. In addition, approximately 974 persons took the 1980 hiring examination and about 724 of those applicants were black and are included in the Hammon class. However, there is some overlap because a (presently undetermined) number of those 724 black applicants have since been hired and are currently with the Fire Department. Finally, in addition to the foregoing figures, about 189 retired black firefighters are also part of the Hammon class.

1977) (affirming district court's approval of class action settlement over objection of counsel purporting to represent almost half of the class); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir.) (affirming district court's approval of class action settlement over objections by over twenty percent of class), cert. denied, 419 U.S. 900 (1974).

While the fact that a relatively small percentage of the class members objects to a proposed settlement is not dispositive, "[c]ourts have taken the position that one indication of the fairness of a settlement is the lack of or small number of objections." 2 H. Newberg, Newberg on Class Actions § 11.47, at 463 (2d ed. 1985) (citing Laskey v. International Union (UAW), 638 P.2d 954 (6th Cir. 1981)). The low percentage of objectors in this case is one factor in the Court's conclusion that the Settlement Agreement is fair and that almost all of the class members are looking forward to its approval so that the promotions

can be made, the promotional tests given, and the settlement fund disbursed.

C. Adequacy of Monetary Aspect of Settlement

Next, the Court considers the adequacy of the $ 3.5 million lump-sum payment that the City would make to the Hammon plaintiffs under the Settlement Agreement. As far as the Court can tell there has been only one objection--a general objection at that--to the amount of the monetary relief. In view of the factual and legal uncertainties that the Hammon plaintiffs face if they were to proceed to trial,[4] as well as the substantial harm they would continue to suffer by

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[4] Although the record does contain some evidence of discrimination, the Hammon plaintiffs' chances of prevailing in any significant way if this case were to go to trial are by no means overwhelming. In addition to contending with the City's statute of limitations defense, which as discussed below is potentially devastating to the older discrimination claims from that period when discrimination was most obvious, see infra Section D, the Hammon plaintiffs must keep in mind that, at the administrative level, "the Hearing Examiner rejected the lion's share of the [Holmes]-Sheffield [intentional discrimination and adverse impact] allegations." Hammon, 813 F.2d at 415; see also id. at 415 n.5.

being precluded from receiving immediate promotions and taking promotional exams, the Court holds that the 3.5 million settlement amount is well within the range of a reasonable and adequate settlement. Id. § 11.44, at 457 (citing Newman v. Stein, 464 P.2d 689 (2d Cir.), cert. denied, 409 U.S. 1039 (1972)). Another factor in the Court's analysis is that the Special Master argues in support of the reasonableness of the $3.5 million figure. Most important, however, is that counsel--who represent three very different parties, who have been deeply involved in this case from the beginning and can evaluate their cases, better than anyone else, and who have failed to agree for so long--all agreed after extensive arms-length negotiations that $ 3.5 million was a fair settlement. See id. 11.46, at 462 ("'The court should give great weight to the fact that the lawyers for substantially all of the plaintiffs and defendant who have been engaged in this arduous litigation for seven years

unanimously support the settlement."' (quoting Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 308, 316 (S.D.N.Y. 1972))).

It is well established that a court deciding whether to approve a class action settlement should not substitute its judgment for that of the proponents of the settlement, id. § 11.44, at 457 (citing Steinberg v. Carey, 470 P. Supp. 471 (S.D.N.Y. 1979)), and that "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results," id. § 11.49, at 466. Consequently, the Court sees no reason on this record to reject or modify the $3.5 million figure negotiated by the parties.[5] Any argument that the Hammon

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[5] The Court pauses to note briefly that it is axiomatic that the Hammon plaintiffs are bound by the provisions of the Settlement Agreement which specify that they will receive $ 3.5 million from the City. Therefore, the Court summarily rejects Joan Burt's frivolous post-Fairness Hearing request that the Court unilaterally "modify" the Settlement Agreement and order the City to pay an additional $1 million into the settlement fund. See October 31, 1990 Hammon Plaintiffs' Post-Fairness Hearing Report to the Court at 8. A settlement agreement

plaintiffs would recover much more than $ 3.5 million if they proceeded to trial not only is pure speculation,[6] but also fails to take into account that this $ 3.5 million would go immediately and directly to the class (without attorneys' fees or any further costs being subtracted) whereas another

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is a contract that may not be unilaterally rescinded, see American Sec. Vanlines, Inc. v. Gallagher, 782 F.2d 1056, 1060 (D.C. Cir. 1986), and "when [one party) attempt[s] to withdraw from the agreement, [the other party can] enforce[] it by requesting the district court to enter the appropriate order," Village of Kaktovik v. Watt, 689 F.2d 222, 230 (D.C. Cir. 1982).

[6] Joan Burt's extensive discussion of the claims by named plaintiffs and individual class members claiming under them is the epitome of such speculation. In Hammon Plaintiffs' Post-Fairness Hearing Report to the Court at 10-15. This part of the report lists specific amounts for claims of retaliation, harassment, embarrassment, and a wide variety of other indignities allegedly suffered by individual class members including named plaintiffs without recognizing that, at this point, they are nothing more than allegations or claims. There is no indication that any of these claims are supported by sufficient proof to pin liability on the City at trial (assuming this case went to trial) nor is there any indication that the exact sums of money that Joan Burt proffers are accurate measures of the relief that would be awarded even if the City were held liable. The Hammon plaintiffs' report erroneously treats harassment/retaliation types of discrimination claims as if they were claims for liquidated damages or for sums certain under a contract, making the fallacy of equating claims for finite sums of money with monetary remedies awarded by a fact-finder after a trial.

amount disbursed pursuant to a judgment, if any, after trial would probably reach the class members only after several years of trial and appellate litigation.

D. Apportionment of Settlement Fund

A large percentage of the objections represent challenges to the way in which the $ 3.5 million settlement fund would be apportioned among Hammon class members. Under the Settlement Agreement and Proposed Consent Decree, that $ 3.5 million would be apportioned as follows: (1) at least $ 2.4 million as compensation for pre-1980 discrimination claims to be divided among all members of the Hammon class who were members of the Fire Department on January 1, 1980, Agreement, Appendix I, Part A ¶¶ 8-10; (2) no more than $ 1 million as compensation for post-1980 discrimination in hiring claims to be divided among all members of the Hammon class who completed the 1980 hiring test and either were never hired or

were hired after the average date on which white test-takers were hired (July 1, 1982), id. Part A ¶¶ 12-14; and (3) $100,000 as compensation for individual class members who contributed to the litigation by rendering services on their own time or who bore "special burdens . . . during this litigation," Proposed Consent Decree, Appendix II, Part I ¶ 25.

About forty retired firefighters (most of whom were represented at the Fairness Hearing by Joel P. Bennett) object to the cut-off date of January 1, 1980 because it would preclude them from sharing in the settlement fund. The Special Master and counsel for all the parties chose this cut-off date only after extensive discussions and careful consideration of the relative weakness of these retirees' claims due to the City's potentially devastating

statute-of-limitations defense.[7] The City made it very clear to everyone involved in this lawsuit that, if settlement talks were to break down, the City would assert and vigorously litigate a statute-of-limitations defense since the discrimination giving rise to the pre-1980 claims occurred, if at all, over four years before the filing of this lawsuit. However, to avoid litigating this issue and having to determine precisely when acts occurred on a case-by-case basis for the numerous members of the Hammon class, the city agreed to waive its statute-of-limitations defense, and counsel for all the parties (including the Hammon plaintiffs' attorney) as well as Special Master agreed that it was highly

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[7] Although there are about 289 retired black firefighters included in the Hammon class, only approximately 40 objected to the January 1, 1980 cut-off date. Moreover, of those retirees who objected, over half of them retired in or long before 1976--over seven years before this lawsuit was filed and well over three years before the Holmes-Sheffield administrative complaints were filed (which in any event only alleged discrimination beginning in October 1979, see Hammon, 813 F.2d at 413.).

likely that claims by any firefighter who retired before January 1, 1980 would be time-barred.[8]

Although the Court feels great sympathy and admiration for the older retired firefighters who probably suffered the most (enduring that period when discrimination in the Fire Department was institutionalized and its most extreme), the Court must evaluate the strengths and weaknesses of the class members' claims within the framework of their likelihood establishing damages at trial. See In Re "Agent Orange" Prod. Liability Litig., 818 F.2d 145, 171 (2d. Cir. 1987) (evaluating district court's approval of settlement by examining strength of claims, which were allegedly "serious" judging by amount of damage

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[8] In fact, the parties and the Special Master correctly recognized that there are some claims by class members who were firefighters on January 1, 1980 that probably would nevertheless have been time-barred, but the parties agreed that this cut-off date would provide somewhat of a cushion to ensure that no legal meritorious claims would be extinguished.

class members suffered, in terms of the likelihood of prevailing on liability), cert. denied, 484 U.S. 1004 (1988). Moreover, in evaluating the formula for apportioning the settlement fund, the Court keeps in mind that "[d]istrict courts enjoy broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members equitably.'" In Re "Agent Orange" Prod. Liability Litig., 818 F.2d 179, 181 (2d. Cir. 1987) (quoting Beecher v. Able, 575 F.2d 1010, 1016 (2d Cir. 1978)), cert. denied, 487 U.S. 1234 (1988). In view of the likelihood that the retirees' claims would be time-barred and the at counsel for all the parties (including the Hammon plaintiffs' counsel when signing the Settlement Agreement) and the Special Master all agreed that the January 1, 1980 cut-off date was proper, the Court holds' that the Settlement Agreement is fair, adequate, and reasonable and must be approved over the retirees'

objections.[9] See id. at 182 (district court has "discretion to adopt whatever distribution plan [it] determine[s] to be in the best interests of the class as a whole notwithstanding the objections of class counsel or of a large number of class members," (emphasis added; citations omitted)).

Another objection to the allocation of the settlement fund envisioned by the Settlement Agreement and the Proposed Consent Decree--not raised until the Hammon Plaintiffs' post-Fairness Hearing Report to the Court--is that certain named plaintiffs and individual class members claiming under them should receive additional money for

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[9] Nor does the common objection submitted by Joel Bennett on behalf of most of the retired firefighters shake the Court's conclusion. Nowhere does this one-and-a-half page filing even attempt to dispute the proposition that, if this litigation were to proceed, the retirees' claims would be time-barred.

Furthermore, contrary to the filing's assertions (unsupported by any authority) that the Settlement Agreement is unfair to the retirees and confers a disproportionate benefit upon other class members, use of the cut-off date properly recognizes that the retirees' claims are weak as a matter of law and that it is fair to distribute the settlement fund in direct proportion to the relative strength of the class members' claims.

suffering more serious discrimination than the other class members. See supra note 6. Under the Settlement Agreement, the named plaintiffs--who are properly members of the Hammon classic[10] --would receive: (1) a share of the $ 2.4 million (if working for the Fire Department on January 1, 1980) allocated to pre-1980 discrimination claims in direct proportion to how many years that plaintiff worked for the Fire Department or (2) a share of the $1 million allocated to claims arising out of the administration of the 1980 hiring test. In addition to the foregoing, the Proposed Consent Decree addresses the possibility that certain class members experienced more serious discrimination by allowing then to

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[10] An examination of the allegations contained in the Hammon plaintiffs' Amended Complaint reveals that two of the named plaintiffs, Rose L. Queen and Gregory R. Lee, apparently neither were firefighters nor took the 1980 hiring test. In Amended Complaint ¶¶ 13 & 14 (alleging that Rose L. Queen and Gregory R. Lee were employees of the City government who suffered retaliation for testifying at the Holmes-Sheffield administrative hearings). If that is the case, then these two named plaintiffs (as well as individuals claiming under them, if any) are of course not members of the Hammon class and would not be entitled to any share of the settlement fund.

submit claims for shares of the $100,000 amount set aside for those members who made litigation contributions or bore "special burdens" as identified by the Hammon plaintiffs.

Thus, although nothing is definite yet since claims forms have not been submitted and precise calculations have not been made, it appears to the Court on this record that, as a result of these three sub-divisions of the settlement fund, each of the named plaintiffs would receive some amount of monetary relief (as well as promotions or the opportunity to take promotional tests).[11] Therefore, the Court is not

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[11] Due to the unique circumstances of Marvin K. Hammon's background--apparently he worked at the Fire Department during the 1970's; resigned in good standing to move to Louisiana in 1977; returned and was told to take the 1980 exam; and then was finally rehired in 1985--none of the parties objected to the Special Master's on-the-record suggestion that the January 1, 1980 cut-off date will not apply to him. See October 16, 1990 Meeting with Special Master Tr. at 20-21. As for Larry McMillan, another named plaintiff, although he would seem to be precluded by the January 1, 1980 cut-off date from sharing in the $ 2.4 million part of the settlement fund, the court can perceive no reason why he would not *be* entitled to recover part of the $100,000 set-aside amount if he can substantiate his allegations of great harassment and retaliation. Of course, both Hammon and McMillan (along with most of the other Hammon class members) will also benefit greatly from the creation of a fourth platoon and the opportunity to take

persuaded that the Settlement Agreement should be rejected because certain plaintiffs do not receive more money.

Finally, about two objectors argued that the heirs or estates of those deceased firefighters who otherwise would have shared in the settlement fund should be entitled to recover monetary relief on behalf of the decedent. All the parties and the Special Master have agreed to modify the proposed Claims Form to accommodate the heirs or estates of deceased firefighters in accordance with these few objections, See October 16 Meeting with Special Master Tr. at 19-20, and the Court also approves of this slight modification to the Claims Form, especially since the Settlement Agreement did not address this issue one way or the other.

E. Union Voting Procedures

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promotional tests in December 1990 and in the first half of 1991.

The Court received about six objections based on the voting procedure utilized to determine whether Local 36 would ratify the Settlement Agreement signed, subject to Local 36 ratification, by the counsel for the Byrne plaintiffs and Local 36. Instead of resorting to mail notice of the proposed settlement--which would have consumed four or five weeks that could not be spared in view of the rapidly approaching December test date--the Special Master directed that voting occur within one week of the Settlement Agreement's being signed, and the Union President and counsel agreed that this procedure was feasible. Consequently, the Settlement Agreement was widely circulated among union members and was even posted in the various firehouses. In light of the great attention this litigation has received among union members, the ensuing vigorous debate, and the representations of the Union President, counsel for the Byrne plaintiffs, and the Special

Master, the Court is fully satisfied that the notice and voting procedures were perfectly proper and that all interested union members had a fair opportunity to be heard. Indeed, the packed Courtroom, with standing room only, at the October 23, 1990 Fairness Hearing demonstrates that all interested parties are aware of what has taken, and is taking, place in this case and that the various notices were effective. See Notices, Appendix III.

F. Use of Lists For Immediate Promotions

Of the total number of objections registered against the Settlement Agreement orally or in writing, a relatively large number challenge some aspect of the procedure for making about 180 immediate promotions (for vacancies existing as of March 1, 1989) from lists based upon the last promotional exam administered in 1984. Some class members want more immediate promotions while others argue that those who served in an acting capacity should have

preference for promotions, and still others contend that these lists should not be relied upon to fill all of the vacancies because they usually would be valid for only two years.

However, most, if not all, of these objections are motivated by the self-interest of the individual objector, and none of them indicate that the Settlement Agreement's procedure for making immediate promotions unfairly benefits any one group of firefighters at the expense of any other group.[12] Moreover, the objections that rely upon the usual two-year life-span of promotional lists overlook the unfortunate but undeniable reality that nobody--not the

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[12] Although some firefighters, who have been serving during this litigation at a higher rank in an acting capacity, will not be promoted immediately under the Settlement Agreement, there is no indication on this record that any of them were ever promised promotions. Moreover, the parties have stated that these firefighters were specifically told that serving in an acting capacity would provide no basis for preferential consideration when permanent promotions were made. See Proposed Consent Decree, Appendix II, Part Two ¶ 3. Finally, the firefighters serving in an acting capacity have the opportunity to take the promotional tests and compete for promotions for all vacancies arising as of March 1, 1989.

parties, not the Special Master, and not this Court--can turn back the clock and duplicate exactly what would have occurred if promotional tests had been given in 1986 and 1988. In short, because this is no longer a "usual" situation, the "usual" rules and procedures utilized to make promotions in the past should not be blindly applied. All of the parties recognized that immediate promotions are absolutely essential for the public safety, not to mention improving Fire Department morale for both the Hammon and the Byrne classes.[13] The Court is satisfied that using the 1984 promotional lists to make immediate promotions while also creating a new (fourth) platoon is a fair, reasonable, and

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[13] The importance of these immediate promotions is underscored by the fact that, despite initially registering forceful opposition to relying upon the 1984 promotional lists to fill any vacancies arising after October 15, 1986, the Byrne plaintiffs and Local 36 ultimately agreed with the Hammon plaintiffs to this procedure. Moreover, the Court is extremely perplexed by the Hammon plaintiffs' implicit criticism of reliance on the promotional lists, see Harmon Plaintiffs' Post-Fairness Hearing Report to the Court at 16 n.15, because all along the Hammon plaintiffs have fought tooth-and-nail in favor of using those same promotional lists to make immediate promotions.

non-race-based procedure relying upon seniority and past test results, which comes as close as possible to remedying the lengthy delay in promotions in the Fire Department.[14]

G. Administration of New Promotional Tests

Under the Settlement Agreement and Proposed Consent Decree, fair, non-discriminatory, job-related promotional tests would be administered: (1) in December 1990 to fill vacancies arising after March 1, 1989 and before June 2, 1991 (including the 89 new Sergeant, Lieutenant, and Captain vacancies arising the creation of a fourth platoon by June 1, 1991) and (2) sometime in 1991 so as to permit

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[14] About two objecting class members who are retired argue that the Settlement Agreement's promotion procedures should be modified to give them retroactive promotions and increase their retirement benefits. However, that objection is without merit because it would confer an unexpected windfall benefit upon these individuals, who are no worse off under the Settlement Agreement than they expected when they retired. They decided to retire and collect their benefits, thus avoiding the continuing risk that this litigation would destroy their chances for advancement. On the other hand, those class members who decided not to retire assumed the risk that their chances for advancement could be stunted indefinitely by this litigation, and, in return for that decision, they properly benefit under this Settlement Agreement.

announcement of the promotional registry by August 1, 1991 to fill vacancies arising after June 1, 1991. Some class members object that it is unfair to permit their colleagues who benefit from the immediate promotions discussed above to also take these two soon-to-be-administered promotional tests. However, these objections in effect argue for applying rules and procedures developed for usual situations to this highly unusual situation, displaying the same fallacious reasoning rejected above. See supra Section F. The City needs immediate promotions based upon fair promotional tests; the TDC has been working diligently, with the Special Master's assistance, to complete the December 1990 promotional test; and class members on both sides of this lawsuit have already waited much too long for the "privilege" of taking a promotional test. In fact, for many class members the December 1990 promotional test will be their first opportunity for a promotion. Under these unique

and unfortunate circumstances, the Court sees nothing wrong with a Settlement Agreement that increases the opportunities for all long-suffering firefighters to take promotional tests quickly to make up for the absence of promotional tests during the last six years.

One common objection to the Settlement Agreement's procedures for administering promotional tests has been raised by some, if not all, of the members of the "Fire Prevention" unit of the Fire Department (as opposed to the much more larger "Fire Suppression" unit), who contend that the Settlement Agreement should be modified to require a promotional test for Fire Suppression separate from the Fire Prevention test. However, the Special Master, the Byrne plaintiffs, and the City have presented several persuasive reasons why this objection is insufficient to require rejection of the Settlement Agreement: (1) the number of vacancies in the Fire Suppression unit is so low (perhaps only one) that

administering entirely different Sergeant, Lieutenant, and Captain promotional tests for the Fire suppression unit is not economically sound; (2) in the short tine remaining, the TDC cannot complete the December 1990 promotional test and also develop separate Fire Prevention tests; (3) Fire Prevention personnel would be eligible to take the unitary promotional tests and compete with Fire Suppression personnel for vacancies throughout the Fire Department; and (4) fully cognizant of the City's historic practice of administering one unitary promotional test, Fire Prevention personnel nevertheless voluntarily elected to serve in that unit instead of Fire Suppression.

However, despite the foregoing convincing reasons that militate against the objections by Fire Prevention personnel, all of the parties and the Special Master have pledged that they would continue to give serious consideration to these objections, and the City has agreed to

reserve any vacancy or vacancies in the Fire Prevention unit until the parties, working with the Special Master, have arrived at a fair promotional system for the Fire Prevention personnel. In light of the factors supporting the administration of a unitary promotional test at this time and the assurances by all the parties and the Special Master that they are receptive to the Fire Prevention objectors' concerns and are working diligently to consider alternatives to accommodate the Fire Prevention unit,[15] the Court holds that the objections submitted by members of the Fire Prevention unit are insufficient to preclude this Court from approving the Settlement Agreement as a fair resolution of this litigation.

E. Final Certification

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[15] Most recently, the Special Master has informed the Court that he and the parties are seriously considering the Fire Prevention personnel's newest suggestion that a merit system of promotions for the Fire Prevention unit maybe more cost-effective than administering a separate promotional test.

Having decided that the Settlement Agreement signed by all the parties on August 20, 1990 should be approved pursuant to Fed. R. Civ. P. 23(e), the Court must also make a final certification of the two classes in this case as required by Fed. R. Civ. P. 23 (c) (3), since this lawsuit is clearly a Rule 23 (b)(2) type of class action and properly has been treated as such throughout this litigation only for purposes of settlement and entry of the Court's Decree implementing the parties' Settlement Agreement, the Court makes a final certification that the Hammon plaintiffs represent a class composed of black uniformed D.C. Fire Department employees and past, present, and future applicants for employment therein and that the Byrne plaintiffs represent a class composed of white uniformed D.C. Fire Department employees who took the 1984 examinations for promotions to the ranks of Sergeant, Lieutenant, and Captain. Furthermore, the Court finds that: (1) the Hammon and

Byrne classes are so numerous that joinder of their respective members is impracticable; (2) there are questions of law and fact common to each of the classes; (3) the claims of the respective named plaintiffs are typical of the claims of each of the classes they represent; and (4) the representatives of the Hammon and Byrne classes fairly and adequately protected the interests of their respective classes. Fed. R. Civ. P. 23(a).

F. Minor Modifications and Entry of Conditional Decree

The parties have consistently agreed that this Court, once it approves the Settlement Agreement, may enter its own Decree in accordance with the terms of that Settlement Agreement should all three parties be unable to agree upon a consent decree. The Court holds that the Proposed Consent Decree, which has been proffered and supported by the Special Master and signed by the City and the Byrne

plaintiffs, see Proposed Consent Decree, Appendix II, properly implements the Settlement Agreement and is in no way inconsistent therewith. Furthermore, the Court holds that Joan Burt's objections and suggested modifications to the Proposed Consent Decree contained in the Hammon Plaintiffs' Post-Fairness Report to the Court not only are meritless but also directly contradict the final and binding Settlement Agreement that she signed on the Hammon plaintiffs' behalf as well as her on-the-record statements approving the Proposed Consent Decree. Therefore, the Court will adopt--with some modifications--the Proposed Consent Decree, attached hereto as Appendix II, as its own Decree, but will order that the Decree will not become effective for several days to give the parties one last opportunity to submit a consent decree signed by all three parties.

In addition, the Court will make certain

modifications--not inconsistent with the Settlement Agreement--to the Proposed Consent Decree before adopting it as the Court's Decree. First, the Court sees no reason why the City should be held to its end of the bargain contemplated by the Proposed Consent Decree and required to make an immediate lump-sum payment of $150,000 to the Hammon plaintiffs as interim attorneys' fees when it no longer has the assurance that the Hammon plaintiffs, who refused to sign the Proposed Consent Decree, will not appeal the Court's Decree entered in accordance with the Settlement Agreement. Therefore, the Court will modify those provisions that require the City to make a lump sum $150,000 payment for interim attorneys' fees to counsel for each of the classes and will order that these payments be placed in separate funds (also separate from the $3.5 million special fund) under the Special Master's supervision and be disbursed only to Joan Burt and Dovey Roundtree (for the

Hammon plaintiffs) and to the law firm of Bredhoff and Kaiser (for the Byrne plaintiffs) and only after the period for appeals expires and appeals, if any are decided or dismissed.[16]

Second, the Court recognizes the unfortunate fact that, since all the parties did not sign the Proposed Consent Decree, they are not bound by the provisions contained therein prohibiting parties from appealing the Court's Decree. However, notwithstanding the foregoing, the Court expresses its sincerest hope that all of the parties will realize that it is not in their best interest to attack and further delay the substantial benefits they would receive under the Settlement Agreement and Decree.

Finally, the Court will approve the Claims Form, see

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[16] Moreover, the Court will order that any interest accruing on these funds pending appeals, if any, may be used to pay the Hammon plaintiffs' and the Byrne plaintiffs' portions of the Special Master's fees and expenses and that the remainder of the accrued interest, if any, will be returned to the City.

Appendix IV, upon the condition that the Special Master and the parties modify the form to: (1) enable heirs or estates of deceased firefighters to submit claims; (2) make it clear that class members may submit claims for special burdens borne during the course of this litigation (as well as special services rendered on behalf of the class); (3) make January 2, 1991 the deadline for submission of claims forms; and (4) require that the forms be sent, not to the Clerk of the Court, but to a post office box under the Special Master's supervision.

III. Conclusion

It is well established that, "[p]articularly in class action suits, there is an overriding public interest in favor of settlement." Cotton v. Hinton, 559 P.2d 1326, 1331 (5th Cir. 1977). Moreover, "litigants should be encouraged to determine their respective rights between themselves." Id. In this case, three parties who have been antagonistic and unable to agree on much of anything over a period of several

years have now agreed upon one document to resolve this lawsuit, and all three parties signed this document, referred to herein as the Settlement Agreement, on August 20, 1990. Furthermore, the Court has been intimately involved in this case since 1984, has reviewed and considered all of the objections submitted against the Settlement Agreement, and has "'closely and carefully scrutinize[d] the . . [Settlement Agreement] to make sure that it [is] fair, adequate and reasonable.'" County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323 (2d Cir. 1990) (quoting Plummer v. Chemical Bank, 668 F.2d 654, 658 (2d Cir. 1982)). In light of the foregoing, the Court, in the exercise of its broad discretion in this matter, approves the parties' Settlement Agreement as a fair, adequate and reasonable resolution to this litigation and conditionally enters a Decree to implement that Settlement Agreement.

The Court will issue an order of even date herewith

in accordance with the foregoing opinion.

November 6, 1990

/s/Charles R. Richey
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action
No. 84-903 (CRR)
No. 85-782 (CRR)

MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

MARION S. BARRY, *et al.*,
Defendants

SPECIAL MASTER'S REPORT ON MOTION FOR STAY OF DISTRIBUTION SETTLEMENT FUND AND REQUEST FOR PERMISSION TO DISTRIBUTE

[Filed February 21, 1992]

The Motion to Stay

On behalf of certain retired firefighters, Donald Temple has filed a motion for a stay of distribution of the settlement funds which were deposited by the City following the entry of this Court's November 6, 1990 Decree and

Order. Mr. Temple's Motion and his Memorandum of Points and Authorities in support of it are attached hereto. Also attached is a response by the Byrne plaintiffs-Local 36. For the reasons stated herein, the Special Master recommends that he be permitted to distribute the funds in the manner described below notwithstanding Mr. Temple's stated intention to file a petition for certiorari.

Background of the Motion to Stay

As Mr. Temple accurately states in his Memorandum of Points and Authorities, he appealed on behalf of retired firefighters from the Court's November 6, 1990 ruling, and the court of appeals dismissed the appeal in reliance on this Court's reasoning. Mr. Temple's suggestion for rehearing en banc was rejected on January 28, 1992, and the mandate issued on February 4, 1992. Under the Court's Decree and Order, $3,500,000 in a fund for the Hammon plaintiffs, $150,000 in a fund for the Hammon counsel, and $150,000

in a fund for the Byrne-Local 36 counsel are to be distributed "once the period for appeals has expired and all appeals, if any, have been completely decided or dismissed, and . . . the settlement is upheld."

Mr. Temple argues, however, that the period for appeals has not expired because the 90 day period in which he may file a petition for certiorari has not run, and he intends to file a petition with the Supreme Court. Thus, he asks the Court to interpret its Decree and Order to provide that the funds which the City has deposited may not be distributed until his petition has been filed and acted upon.

The Governing Law

It appears that Mr. Temple relies on two different theories in seeking a stay. First, he asks the Court to interpret its own language and to hold that the period for appeals as set forth in the Decree and Order includes a petition for certiorari. Second, he argues essentially, at page

8-9 of his Memorandum, that a balance of the equities favors a stay. The Special Master recommends that both of these arguments be rejected.

The argument that the Court intended the period for appeals to include the certiorari period ignores the reason why the Court delayed the distribution of funds pending appeal. The City had expressed a reasonable concern that its money should not be distributed while a direct appeal was pending, because the amount of money at risk was so high that any prospect of a reversal on any point raised on appeal was unacceptable. This reasonable concern was directed at an appeal to the circuit court. Although the Special Master has not reviewed everything filed with the Court at or near the time of the fairness hearing, his memory is that a petition for certiorari was not the concern of the City or any other party.

The City has filed with the Special Master and Court

a document entitled "Defendants' Report to the Court on Disbursement of Experts' Expenses and Fees in Response to the Court's Order for January 27, 1992." A copy is attached. At pages 2-3, the City states as follows: "As to the distribution of the settlement funds, defendants note that the Court's Decree and Order approving the settlement prohibits distribution of settlement proceeds until the conclusion of all appeals. Since a Petition for a Writ of Certiorari is not an appeal, under the rules of the Supreme Court, defendants support distribution of the settlement funds even if a Petition for Certiorari is filed."

Thus, the only party at risk as a result of distribution of the funds believes that the funds should be distributed and does not seek any further protection against Mr. Temple's clients. Since the principal purpose of including in the Court's Decree and Order language forbidding distribution while appeals were pending was to protect the City, and the

City has announced that it did not seek and does not want protection against a petition for certiorari, the better reading of the Court's Decree and Order is that the appeals period has run and the money may be distributed.

The Equities

Mr. Temple claims that a stay is necessary to prevent irreparable injury to his clients. This claim is not frivolous, but the equities appear to cut against a stay rather than for one, at least in the Special Master's opinion. Mr. Temple simply assumes at pages 9-10 of his Memorandum that all of his clients would automatically be entitled to a proportionate percentage of the various sums that were allocated in the settlement to time periods covered by the settlement. But, the City and the Byrne plaintiffs-Local 36 have argued that, at most, only Mr. Smith could obtain relief in the Supreme Court because the appeal named him as the sole appellant. Thus, even in the unlikely chance certiorari were to be

granted, it is possible that only one client of Mr. Temple's could obtain relief under the best of circumstances.

Moreover, it seems that the only valid complaint that Mr. Temple's clients have is that the Decree and Order extinguished their claims. As long as their claims are preserved, they cannot point to prejudice from the fact that other claims, as to which the statute of limitations defenses were less clear, were settled on a different basis. If Mr. Temple is successful in petitioning the Supreme Court for review and in obtaining a reversal, his client of clients (depending on whether Mr. Smith is the sole appellant) remain free to proceed against the City and to seek any relief to which he or they can prove entitlement.

If it should turn out, as the parties to the settlement believed, that all of Mr. Smith's clients' claims are barred by the statute of limitations, any success in the Supreme Court would be moot. This, however, would not be a product of

the settlement; it would simply reflect that the claims were not filed in a timely fashion.

In sum, the City is at risk with respect to any claim which Mr. Temple is able to resurrect in the Supreme Court. Under these circumstances, there does not seem to be irreparable injury.

The injury that would result to the other parties from further delay is palpable. Although Mr. Temple has every right to protect his client's interests, the appeal he filed and the petition for rehearing partly prevented distribution of a substantial sum of money to a group of firefighters who have litigated for many years. It is true, of course, that during part of the time Mr. Temple's appeal was pending, Ms. Burt also had an appeal pending, and as long as her appeal was pending no money could be distributed. But, when her appeal was dismissed, only Mr. Temple's continued to delay distribution of funds. The continued delay has proved

confusing and divisive. It has exacerbated disharmony in the Fire Department because firefighters who expected reasonably prompt compensation have been unable to receive it. They have from time to time blamed the City, the Mayor, Local 36 and the Special Master. This has been unfair because neither the parties nor the Special Master had any right to distribute a penny of the funds while appeals were pending. The Court made this clear time and again. Only Ms. Burt's appeal had a potential to delay distribution of the funds; no other party did anything that resulted or contributed to delay.

The Special Master has wanted to distribute the funds and has regretted his inability to do so. **He wants to distribute the funds as soon as the Court will permit and has so indicated to counsel for the City and the Hammon plaintiffs.** In response, the City has clearly stated that it believes the money should be distributed. In filing this

statement, the City and the Mayor have shown a willingness to assume a risk for the benefit of the Hammon plaintiffs and to put this case to an end. The City has been most responsible in urging that the money it provided to settle a bitter dispute and to get the Fire Department moving in a positive direction should be properly distributed without further delay so that all of the benefits of the settlement can be achieved.

Another factor which Mr. Temple asks the Court to consider is the likelihood of a reversal. Given the dismissals of his appeal and the summary disposition of his suggestion of rehearing en banc, and the careful attention this Court gave to the claims of retired firefighters, the chance of reversal appears small. This factor also cuts in favor of a denial of the motion for a stay.

The Special Master hopes that the Court will agree that a stay should be denied. The Court expressed in its

Opinion its sincere regrets about discrimination which long-retired firefighters suffered many years ago, and the Special Master shares the Court's concern. The Special Master is also concerned, however, about the adverse impact that delay in distribution may have had on the Fire Department and believes that when the money is distributed the healing aspects of the settlement may be more clearly recognized.

Manner of Distribution

The Special Master intends, with the Court's approval, to order the bank to distribute the interim attorney's fees of $150,000 as soon as possible after the Court approves distribution and determines the proportion of the Hammon fund that goes to Ms. Burt and the portion that goes to Ms. Roundtree. The Special Master also intends, with the Court's approval, to distribute $3,400,000 to the Hammon claimants as soon as arrangements with the bank can be made to issue individual checks in the amount that the

Special Master has determined from the claim forms each claimant is entitled to receive under the Court's Decree and Order. This will dispose of the bulk of the money.

The $100,000 special fund which is available to all claimants who claim to have made litigation contributions or borne special burdens requires some additional work. There are numerous claimants who seek en toto far more that $100,000. The Special Master has invited Ms. Burt to suggest procedures for resolving these claims (letter attached), but she has made no response. The Special Master has also indicated a concern about a possible conflict of interest between counsel and the claimants for the special fund. This is the subject of a separate filing which is made today. The special fund will be distributed as soon as the competing claim can be sorted out and weighed.

Also remaining is the interest on the $3,500,000. It is not possible to know how much will be spent on

administrative costs in issuing checks and 1099 forms. The Special Master has suggested that the Court may wish to order that the Hammon plaintiffs portion of the Special Master's expenses and fees be paid from the interest. Under the Court's Decree and Order, the remaining interest "shall accrue to the Hammon plaintiffs for disbursement to individual class members as the Hammon plaintiffs and the Special Master see fit." Once it is known how much interest remains, a decision on how to distribute such interest can be made.

Request for Order

For the reasons stated above, the Special Master respectfully requests that the Court enter an order which will do the following:

(1) Deny the Motion for a Stay filed by Mr. Temple; and

(2) Permit the Special Master to distribute

immediately the $150,000 attorney's fee funds to the attorneys for the Hammon plaintiffs, once the Court decides on a division between Ms. Burt and Ms. Roundtree, and to the attorneys for the Byrne plaintiffs-Local 36; and

(3) Permit the Special Master to distribute the $100,000 special fund once the competing claims have been analyzed and weighed; and

(4) Permit the Special Master to distribute remaining interest to individual class members after it is known how much remains and the Hammon plaintiffs have an opportunity for input as to which claimants should receive additional compensation.

DATED: February 21, 1992 /s/ Stephen A. Saltzburg
Special Master

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903 (Consolidated Cases)
Hon. Charles R. Richey

MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

MARION S. BARRY, *et al.*,
Defendants

PERSONAL NOTICE TO HAMMON CLASS

[Filed November 6, 1990]

THE LITIGATION: If you are or were a member of the District of Columbia Fire Department or if you were an unsuccessful applicant for employment with the Fire Department, and you claim to be a victim of racial discrimination because you are a black man or woman, you are a member of the "Hammon Class." A lawsuit filed in this Court seeks relief on behalf of a class of persons in

which you are included. The parties have reached a settlement of this lawsuit, and you will be bound by that settlement if it is approved by the Court.

THE SETTLEMENT: The representative of the Hammon class have reached a settlement with the District of Columbia regarding all claims of past discrimination involving members of the class. That agreement provides for monetary compensation to some class members, promoting for some class members, and development of future nondiscriminatory promotion tests. The agreement will be embodied in a formal decree which will be approved by the Court. All members of the class will be bound by the decree. The decree will resolve all claims of past discrimination against black employees and/or applicants for employment with the Fire Department--i.e., claims of discrimination in hiring, promotion, working conditions, etc., and all claims of racial discrimination against black

firefighters or applicants based upon any event which occurred prior to the date of the decree. The settlement resolves all claims of discrimination actually made or which might have been made. If the settlement is approved by the Court, no member of the Class may hereafter sue the City, any department or representative thereof, or any party to the settlement agreement with respect to these matters.

The agreement signed by the parties is attached to this notice. Although a final decree has not yet been approved, it will embody the terms of the signed agreement, as well as set forth procedures for implementing the agreement.

OBJECTIONS: Any member of the class may object to the terms of the agreement. To do so, a class member must object in writing, setting forth specifically the grounds for objection, and referring to the case number 84-0903. That writing must be received by James F. Davey, Clerk of the United States District Court for the District of Columbia,

3rd & Constitution Aves., N.W., Washington, D.C. 20001 no later than October 9, 1990. Any person who wishes to be heard, personally or through counsel, may appear at a fairness hearing to be held at 2:00 p.m., October 23, 1990, in Courtroom 10 of the United States District Court, provided that such person has filed a timely written objection.

MAKING A CLAIM: A claims form will be made available to all current members of the Fire Department who are members of the Hammon Class after it is approved by the Court. Any other person may request a claims form by writing to James F. Davey, Clerk of the United States District Court for the District of Columbia, 3rd & Constitution Aves., N.W., Washington, D.C. 20001 no later than October 29, 1990, providing his/her name, address, home telephone and social security number, and referring to case number 84-0903. Claims forms will be provided as

soon as possible after they are approved by the Court.

LEGAL ASSISTANCE: Any person who believes that he or she is or may be a member of the class and who has questions concerning the settlement or how to make a claim, may contact the lawyers for the Hammon Class at (202) 479-2697. Ask for Ms. Burt.

ADDITIONAL COPIES: Additional copies of this notice, with the attachments--i.e., the signed agreement and the promotion schedules--will be available in Room S102 (Public Affairs Office) of the D.C. Fire Department, at 1923 Vermont Ave., N.W., Washington, D.C. between the hours of 8:30 and 4:30 from now until October 29, 1990.

James S. Davey
Clerk of the U.S. District Court

SPECIAL MASTER'S PROPOSED FINAL AGREEMENT AMONG HAMMON PLAINTIFFS, BYRNE PLAINTIFFS, AND LOCAL 36 AND THE CITY

This agreement has been drafted by the Special Master, who has for purposes of encouraging discussions, circulated for private consideration other drafts, but who has asked that all prior drafts be considered privileged, preliminary discussion material and not circulated beyond counsel and principal representatives of each party. In an effort to promote settlement and to clear the air with respect to what the Special Master believes would be a fair and equitable--but by no means perfect--resolution of all claims and disputes, the Special Master has prepared a proposed agreement. It may be shown to anyone and is not intended to be confidential.

It should be clear that no party approved this proposed settlement agreement prior to its circulation. The proposed agreement represents a way of resolving all issues

at a cost to the City which the Special Master believes is reasonable and defensible; provides compensation for alleged past discrimination, some of which might otherwise be barred by a statute of limitations in the interests of achieving substantial justice; and assures that no individual is favored or disadvantaged with respect to job opportunities in the Fire Department on the basis of race.

The views of no one party predominate. Some provisions of this agreement are included despite the Special Master's knowledge that they are objectionable to one or even two parties. But, the Special Master is persuaded that the agreement is fair overall, that it provides all parties with knowledge as to what amount of money is to be paid and what other remedies are to be provided, it will provide much needed promotions sooner than any other plan, and the public should find it responsive to its needs as well as the needs of all litigants.

This proposed agreement is divided into two parts. The first relates to hiring and all related claims. The second relates to promotions. If the Hammon plaintiffs, the Byrne plaintiffs and the City together agree on Part B and sign it, And if the Hammon plaintiffs and the City agree on Part A and sign it, the Special Master will ask the Court to approve the agreement, notwithstanding any opposition from the Byrne plaintiffs or from any other source to the monetary amount provided or any other remedy set forth in Part A. Neither Part A nor Part B will be effective unless both parties are ratified by the parties thereto.

PART A

SETTLEMENT AGREEMENT AS TO HIRING AND RELATED ISSUES BETWEEN THE HAMMON PLAINTIFFS AND THE CITY

Summary of Agreement

1. This agreement sets forth all essential terms of the settlement of hiring and related issues (defined as all issues other than future promotions). It does not set forth in detail all procedures and details, which shall be provided in a more comprehensive decree which the Hammon plaintiffs and the City shall develop with the Special Master for submission to the Court.

2. This agreement between the Hammon plaintiffs and the City is executed simultaneously with an agreement on future promotions (Part B) among the Hammon plaintiffs, the Byrne plaintiffs, and the City.

3. This agreement and the simultaneous agreement on future promotions, resolve all claims and binds

all members of the Hammon class, and no member of the Class may sue the City or any department or representative, or any party to this settlement with respect to any matter raised in this litigation. The agreement resolves all disputes as to matters arising as of the date it is executed, but does not resolve disputes resulting from future events, tests, decisions, etc. that occur after the date of this agreement.

4. This agreement provides substantial monetary relief to the Hammon class. The City shall pay $3,500,000, to the Hammon class, independent of attorney's fees which may be sought subsequently, and this entire sum shall be distributed to the Hammon class as provided in this agreement.

5. The monetary compensation provided herein has been allocated, to the greatest extent practicable, in accordance with the strength of the individual claims of class members.

6. The amount of compensation $3,500,000 shall be placed in a special fund prior to October 15, 1990, and shall be distributed as soon as possible thereafter in accordance with this agreement, provided that the promotions set forth in Part B, paragraph 5 have been made.

7. The Special Master will work with the parties to provide a detailed decree for consideration by the Court as early as possible.

Pre-1980 Compensation

8. Of the $3,500,000, $2,400,000 is allocated to members of the Hammon class who were also members of the Fire Department on January 1, 1980. Each member of the class shall receive compensation for each year from 1962-1979 in which he or she served as a member of the Department. The compensation will be allocated as follows: (a) 70% of the total amount is allocated to the years 1962-1968, (b) 20% of the total amount is allocated to the years

1969-1972, and (c) 10% of the total amount is allocated to the years 1973-1979.

9. Under paragraph 8, $1,680,000 will be allocated to the years 1962-1968, $480,000 to the years 1969-1972, and $240,000 to the years 1973-1979.

10. Allocation of these sums will be made as follows: The amount allocated to each of the three periods will be divided by the total number of firefighter years of the eligible member of the Hammon class. For example, if 50 eligible firefighters each worked all seven years from 1962-1967, and if 50 other eligible firefighters worked five of the years from 1962-1967, the total number of work years would be 600 (50 x 7= 350, 50 x 5=250). The $1,680,000 would be divided by 600, and the figure of $2,800 per work year would be used as the basis for awarding this portion of the pre-1980 monetary award. An identical process would be used for the periods, 1969-1972, and 1973-1979, The total

award for any firefighter eligible for pre-1980 damages would be based on the total of the work year figures for the three periods.

11. In addition to the $2,400,000, an additional sum may be available to be paid as additional damages for the years 1962-1968, as provided in paragraphs 15 and 17, infra. If any such sum is available, it will be divided by the total work years for this period, and a resulting award for eligible firefighters will be made as a supplementary payment.

Post-1980 Claims

12. The total amount available for compensation for post-1980 claims is $1,000,000. This amount will be distributed as stated in paragraphs 13, 14 and 15, infra.

13. Each member of the Hammon class who completed the 1980 hiring examination and who was hired by the Fire Department will receive the following: $150 per

month for each month between July 1, 1982 and the actual date of employment as a firefighter.

14. Each member of the Hammon class who completed the 1980 hiring examination and was never hired by the Fire Department will receive the following: $100 per month for each month between July 1, 1982, and the date when the City notified the class member that a position as a firefighter was available. The total paid to these class members shall not exceed $500,000.

15. Should the total amount of the payments made pursuant to paragraphs 13 and 14 be less than $1,000,000, the remainder shall be used to pay supplemental damages for pre-1980 claims for the years 1962-1968, as provided in paragraph 11, supra.

16. The Special Order issued by the Fire Department which provided an EOD date of April 12, 1981 for all firefighters hired from the 1980 list, including all

members of the Hammon class, shall remain in full force and effect in the future.

Litigation Contributions

17. A total of $100,000 shall be set aside to compensate individual members of the Hammon class for services rendered in this litigation on their own time. Any member of the Hammon class may submit a claim to the Special Master indicating the hours worked, the services rendered, and the amount claimed. The Special Master shall have discretion to award an appropriate amount to any such claimant, and to distribute the $100,000 equitably among claimants. Should the total amount of the distributions made pursuant to this paragraph by less than $1,000,000, the remainder shall be used to pay supplemental damages for pre-1980 claims for the years 1962-1968, as provided in paragraph 11, supra.

18. The Hammon plaintiffs will propose a schedule

of payments and rationales, which the Special Master will approve under a reasonableness standard.

Privacy Rights

19. The Special Master will approve all payments made pursuant to the provisions set forth above, and the total amounts paid are, by the nature of this document, public. Each member of the Hammon class shall have the right to protect the fact that he or she received payment and the amount of any payment from public disclosure.

Timing

20. No promotions pursuant to Part B of the settlement agreement may be made until the $3,500,000 has been set aside in a fund, which will be more specifically described in the comprehensive decree to be drafted under paragraph 1, supra.

Finality

21. This agreement resolves all claims other than

future promotional claims of the members of the Hammon class. Parts A and B together resolve all claims and bind all class members with respect to all claims of discrimination as of the date of this agreement.

/s/ Joan Burt, Esq.
Counsel for Hammon Plaintiffs

/s/ Herbert O. Reid
Corporation Counsel
District of Columbia

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903

MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

MARION S. BARRY, *et al.*,
Defendants

Civil Action No. 85-782

KEVIN M. BYRNE, *et al.*,
Plaintiffs

v.

THEODORE R. COLEMAN, *et al.*,
Defendants

HAMMON PLAINTIFFS' POST-FAIRNESS HEARING REPORT TO THE COURT

[Filed October 3, 1990]

I. Introduction

As the Court is aware, the parties signed the Special

Master's Settlement Agreement on August 20, 1990.[1] Other than a typographical error corrected on page 3 of Part A, the only change made on said Settlement Agreement was at p 1 of Part A, whereby a more comprehensive consent decree was mandated to be developed by the Hammon plaintiffs and the City with the Special Master. Dr. Reid, Corporation Counsel, D.C. concurred with the Hammon plaintiffs and the Court, to wit, the decree would be a Consent Decree. Thereafter all drafts submitted by the parties and the Special Master proposed only a Consent Decree.[2]

On September 19, 1990, Hammon counsel noted changes to the Special Master's draft Consent Decree believed to be appropriate and necessary to protect the

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[1]Please note: August 10, 1990 cover letter to Appendix A of the settlement attached to Pre-Fairness Hearing Report of Special Master.

[2]The importance of a Consent Decree lies in the body of law developed by the federal courts relating to the effect, interpretation and governance of Consent Decrees, particularly as it relates to firefighter cases.

interests of all the Hammon class members. A copy of said September 19, 1990 letter is appended hereto as Appendix "HA." Thereafter, on or about October 1, the Special Master left the proposed final draft of a consent decree at his office for pickup by the Hammon counsel.[3] When the Special Master called to ascertain if the Hammon plaintiffs would sign said Consent Decree, this counsel indicated that she had only had time to review Part One thereof, but had noted two contradictions therein with the Settlement Agreement at paragraph 15 and 29 of Part One. The Special Master discussed changes that would solve the contradictions and indicated that he would make the two changes and told counsel that he had made none of the changes suggested by the Byrne Class in Part Two, which statement conformed to the Notice to Parties cover letter to said Consent Decree.

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[3]When this counsel sought to obtain said document it had already been picked up by someone from Ms. Roundtree's office and this counsel was unable to obtain a copy until the next day.

This counsel thereupon advised the Special Master that the Hammon plaintiffs would sign the Consent Decree if it so conformed and did not contradict the Settlement Agreement.[4] Although certain significant developments occurred thereafter between October 15 and 24, it is not necessary to describe them at this juncture in that they will be described with the Hammon plaintiffs' review and recommendations relating to the objections to the settlement, infra, and in a separate pleading the Hammon plaintiffs wish to file on or after October 20, 1990.[5]

II. Analysis and Recommendations of Hammon Plaintiffs to Timely Objections

The Hammon plaintiffs have categorized the

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[4]Subsequent to said telephone conversation, this counsel was inundated with telephone calls from individual Hammon class members concerning the settlement agreement and proposed consent decree, particularly those for whom she has a power of attorney to settle their individual claims.

[5]The Hammon plaintiffs need the full number of days provided by the Rules of the Court to respond to pages 3-5 of the Pre-Fairness Hearing Report of Special Master of October 22, 1990.

objections that have been made according to the class to which the maker is a member. (Identified, in part, by the case number cited in the objection.)

There are 19 objections filed to the settlement in the Byrne matter, C.A. 85-0782. The Hammon plaintiffs will not attempt to address said objections, particularly since the proposed Consent Decree at page 1, indicates that: "The parties do not intend by joining in a single decree to provide standing that did not exist prior to the settlement." This essential phrase was proposed by the Hammon plaintiffs and consented to by the City and Byrne plaintiffs and relates to at least one Hammon class objection.

There are 7 requests for claim forms by Hammon class members, which may indicate some confusion on the part of Hammon class members who have submitted claim forms to the Hammon class counsel in connection with the proposed consent decrees submitted by counsel between

March 1, 1989 and March 23, 1990. The plaintiffs have not been informed of the number of claim form requests made to the Clerk of the Court subsequent to October 13, 1990.

The remaining 55 objections were filed to the settlement in the Hammon cases, C.A. 89-0903. The largest number of objections, 33 in number, are by Fire Inspectors in the Fire Prevention Division of the department claiming under named plaintiff James E. Peters in paragraphs 9, 15, 16, 34, 35, 36, 40-49 of the amended complaint filed and answered herein. (Attached hereto as Attachment "HB.") See also the Declaration of James Peters, III, attached hereto and incorporated herein as Attachment "HC", and Agreement by Local 36 to separate Fire Prevention promotional exam, attached to and incorporated herein as Attachment "HD", and the 1986 Stipulation with respect to the Test Development Committee.

These 33 Fire Inspectors have three basic objections

(1) improper use of lateral transfers;

(2) use of non-job related examinations; and

(3) pay scale inequity.

These Fire Inspectors attempted to intervene in the Hammon litigation after the June 20, 1986, Joint Motion for Approval of Proposed Order for the Development of New Promotion Selection Procedure. At a status hearing in November 1986, their motion to intervene was denied on grounds that the Hammon plaintiffs could adequately protect their interests.

The Hammon plaintiffs endeavored and succeeded in protecting their rights and securing separate, job-related promotional examinations for the Fire Prevention Division, thereby eliminating the improper use of lateral transfers and non-job related Fire Suppression examinations. It was expected that the new exams would also eliminate the pay scale inequity within a relatively short time. This was an

important consideration in the Hammon plaintiffs strenuous and consistent opposition to any modifications of the Stipulated Order of 1986.

Pursuant to Part Two of the second draft of the Master's Proposed Consent Decree, circulated on or about September 25, 1990, separate exams were assured for Fire Prevention by the following language:

> 16. The 1986 Stipulation with respect to the Test Development Committee is superseded by this Decree. If, however, the City utilizes a test or tests provided by the Test Development Committee, the provisions of the 1986 Stipulation will govern.

Prior thereto, on September 20, 1990, by Order Regarding Test Development Committee (attached hereto and incorporated herein as Attachment "HD"), the Test Development Committee was ordered to provide the tests the City was to utilize. A plain reading of paragraph 16 supra and said September 20, 1990 Order confirmed for the Hammon plaintiffs that the Stipulation and Order of June

1986 would govern.

Because the Hammon class counsel had not had an opportunity to read Part Two of the October 1, 1990 Consent Decree, she and the class representatives, were unaware[6] that the Special Master had, sua sponte, changed the language at paragraph 15 to not merely modify, as the City has previously asked this Court to do, but throw out the Stipulation and Order of June 1986, in its entirety and to substitute not only non-job related promotion exams in December 1990,[7] but also to substitute the TDC thereafter.[8]

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[6]Counsel had not had time to read Part Two when she said the Hammon plaintiffs would sign the Consent Decree and relied ont he statement that it had not been changed and thereafter had no copy of same until October 23, 1990 at the Fairness Hearing. The material submitted to the Court on October 22, 1990, copies to the parties, did not contain Part Two of said decree.

[7]On October 22, 1990, the Special Master indicated that 20% of the December 1990 Fire Suppression exams would consist of Fire Prevention material. Accordingly, said exams would be 80% non-job related to Fire Prevention Inspectors and 20% non-job related to all firefighters taking same. (See: October 16 Transcript, pp 34:12-49:4 and October 17 Transcript, pp. 37:20-43:10).

[8]October 16 Transcript, p 36:7; 42:17-44:11.

The proposed Consent Decree now reads at Part Two, page 21, as follows:

> 15. The 1986 Stipulation and Order regarding Development of Promotional Procedures is superseded in its entirety by this Decree and by any orders of the Special Masters issued pursuant to the parties' settlement or this Decree.

The Hammon plaintiffs, herewith, move the Court to modify the proposed Consent Decree by striking paragraph 25 thereof and substituting therefore paragraph 16, supra at p 5, the language of the second draft that the Special Master indicated that he did not change.

As grounds for its motion the Hammon plaintiffs aver that paragraph 15 proposes a provision that is unreasonable, unconstitutional and against pubiic policy, thus the Special Master abused his discretion in striking the Stipulation and Order of June 1975, without justification and the consent of all of the parties thereto. (See: United States v. City of

Alexandria, 614 F.2d 1358 (1980).[9]

The next largest group of objections filed to the settlement in the Hammon case are the 9 retired firefighters who were not employed on January 1, 1980. Said individuals were included prior to the settlement fund's reduction from 4.5 million.

While the Special Master states that he chose the 1980 cut-off date because it is highly unlikely that any firefighter who left the department before said date would have had any claim for monetary relief barred by the statute of limitations we are not so convinced.

At the time of the settlement, the Hammon plaintiffs objected to finalizing the formula before the Hammon class was closed. We did not know the total number of the class members who were no longer actively employed by the

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[9]The Hammon plaintiffs incorporated herein its opposition to the Defendants' Motion to Modify the Stipulated Order of 1986.

department. We could only estimate that the number could be accommodated in a total monetary settlement amount of 4.5 Million, based on the preliminary claim forms class counsel distributed in 1980 and 1987.

As it now stands, twelve (12) Hammon class members who retired before 1980 could receive up to $369,6000.00 of their objections were carefully considered. The largest award would be $50,400 and the smallest, $14,000. Of that number, two (2) retired prior to 1968, most of the others retired in 1971 to 1972 and 1979.

As part of the continuing constitutional violation, which impacted on the disparity in salary through the ranks, some or all of these retired firefighters can show (and some have shown) the continuing effects of segregation and salary disparity on their retirement checks, even today. The statue of limitations has never been pleaded by the defendants in this case. Furthermore, the Special Master has never offered

any reason for reducing the settlement fund from 4.5 Million to 3.5 Million.

Accordingly, the Hammon plaintiffs, herewith, move the Court to modify the settlement, to restore the 1 Million Dollars to the settlement fund and to permit the twelve (12) retired firefighters who submitted objections to receive monetary compensation at the same rate as those members of the Hammon class who do take under the settlement formula.

The Hammon plaintiffs do not advocate that these objectors take under the settlement agreement's monetary fund because one of the reason they were excluded was to provide an adequate monetary amount to members of the class after the monetary fund was reduced. We do not object to the fairness of the settlement monetary fund at 3.5 million and the formulae associated therewith for the class members who are included in said settlement. What we object to is the manner and lack of justification with which the Hammon

class was limited by excluding those class members who had retired prior to January 1, 1980 and the named plaintiffs whose timely and legitimate retaliation claims have been demonstrated and justify the previously agreed upon $630,000.00[10]

Although the Special Master states that no general objection has been raised with respect to the post-1980 compensation,[11] the Hammon plaintiffs proffer the next largest number of objections filed to the settlement are those ten (10) the Special Master identified[12] as Individual Objections 1. On Behalf of Families Deceased; and 3. On Idiosyncratic grounds. We identify said objections to be on behalf of the twelve (12) named plaintiffs and those similarly

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[10]The total sum calculated to be a compromise settlement for all of the retired fireman in the class and the named plaintiffs with retaliation claims equals the 1 Million Dollars removed from the settlement fund by the Special Master without any stated justification.

[11]Pre-Fairness Hearing Report of Special Master, p8.

[12]Id. at p.6.

situated[13] who raised timely retaliation claims and prosecuted those claims under Section 704(a), 42 U.S.C. 2000e-3(a) of the 1964 Civil Rights Act. These nineteen (19) named plaintiffs were not permitted to benefit from the formula developed by the Hammon class and its representatives based on claims forms and compromise settlement figures proposed by more than 150 class members, but were compelled to acquiesce in the Special Master's formula (later acknowledged to be in error; See Special Master's cover letter to Special Master's Report on Additional Objections, p1) which produced a disparate distribution excluding the named plaintiffs, without explanation or justification except the Special Master's suggestion to the class representatives that the "Court may well modify the settlement."

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[13]See Attachment "HB", Plaintiffs' Amended Complaint, Part III, paragraphs 4-16, and Declarations of Individuals attached to the Hammon Objections to the Modified Affirmative Action Plan, filed herein on 2-14-86, in Appendix III.

Under the settlement, if there is not a modification by the Court, the following effects, inter alia, will flow to said 19 named plaintiff claimants:

a. Seventeen (17) named plaintiffs will take nothing for the retaliatory acts taken against each (some acts were compounded against these plaintiffs for the ten (10) years that this suit has existed at the cost to them of between 20 to 100,000 Dollars each;

b. Marvin K. Hammon was employed by the DCFD in 1974, he was an exemplary employee and a member of the Truck Co. of the Year in 1976. In 1977 he and his family moved to Louisiana and he resigned in good standing.

He returned to the District in 1979 and sought reinstatement but was told he had to take the 1980 entry level exam. He did so and passed with an 85 but was not rehired. He contacted the PFA and was involved in the 1981

administrative suit before OHR-EEOC. He was hired from the 1980 list in 1985.

DCFD erroneously required him to be rehired instead of being reinstated at his rank and grad level -- a 6 year man.

Had DCFD rehired him in 1979, by 1985 he would have been eligible to take the 1982 Sergeant's exam, 1984 lieutenant's exam and would be eligible for promotion by virtue of the current Settlement Agreement to a Lieutenant.

When he was rehired in 1985, he was brought on board as a 1 year man's salary rather than at an 11 year man's salary. He also lost $91,908.93 in back pay during the years 1981-1985.

As a result of his participation and use of his name in the instant suit he suffered retaliation and harassment as well as money. The stress also caused him to lose time

from work and cost him his family.

One other firefighter claims under him - Larry K. McMillan. He is also a named plaintiff:

b. Larry K. McMillan was hired off the 1988 entry level list, however, he was not hired until 1981. He therefore was not a DC Firefighter on January 1, 1980.

He was in training with the 1980 class and finally was sent to a firehouse where he was subjected to great harassment by white officers and thereafter was placed on administrative leave without pay and filed a declaration in the instant case in 1986.

He was subjected to similar discriminatory practices that blacks were selectively subjected to in the 1950, 1960, and 1970's. See Declaration: Wherein he states that when he was subjected to discriminatory treatment during training because of his race and filed grievances, he was retaliated against and denied sick leave with pay or light

duty for the aggravation of injuries receive in performance of duties which was receive by similarly situated whites. He documents the loss of more than $70,000 as a result of said discrimination and retaliation.

c. Pamela D. Meachum is a black female applicant who took and passed the entry-level firefighter's exam. However, due to the stay imposed on all hirings, plaintiff reached the age of 29 and was removed from the list of eligibles. By virtue of the 1984 Consent Decree between the Hammon plaintiffs and the District she was never hired although she was made eligible by virtue of that Consent Decree. No report was filed by the City indicating that she was hired or reasons for her non-hire.

There are several others who claim under her category, including Ralph J. Rust, a named plaintiff.

d. Ralph J. Rust was alleged to be overweight in 1985 when he responded to accept the job offer pursuant to

the 1984 Consent Decree. There are others who take under him. He documents losing more than $15,000.

e. Albert Montgomery is also a named plaintiff who took the 1980 exam and is similarly situated to Meachum and Rust. However, he was hired by the 84 Consent Decree in 1985, but he lost 4 years of pay, fringe benefits, job experience and training opportunities and preferences that white hires from the 1981 hiring received and will retain through their respective careers. He documents the loss of more than $90,000 as a result of said discrimination. Please note that he won his case of harassment and/or retaliation before OHR on 8-30-89 without monetary relief.

There are others who take under him.

Duane R. Hughley and 17 others at about $50,000 each.

f. Samuel E. White, Sr. took and passed the

1980 exam and was not selected due to alleged medical reasons resulting from discriminatory application of other selection procedures because of his race. He is alleged to have imperfect hearing, but a follow-up test at Galludet College indicated that his hearing was above what was needed to be a fireman; the job he wouldn't qualify for was a concert violinist because of a Higher E that he cannot hear. He documents more than a $60,000 loss.

Three others claim under him.

g. James E. Peters is a black Fire Inspector who has been denied promotional opportunities since 1972 when dependent rules were changed to require inspectors in the Fire Prevention Division to take non-job related Fire Suppression promotional exams. As a further result of his participation in the DHR hearings he was subjected to acts of reprisals and retaliation.

Twelve (12) others claim under him at $30,000 each.

h. Romeo O. Spaulding is a black Sergeant who qualified to be hired in 1962 but was denied hiring until 1965, thereby losing three qualifying years for taking sergeant's exam. He is a principal participating named plaintiff who was retaliated against by threats to his life, damage to his automobile, denied acting promotion pay. He has documented his injuries to exceed $100,000.

Four others claim under him in excess of $100,000.

i. The Progressive Fire Fighters Association challenges the hiring and employment practices and policies of the department and claim $120,000 costs in litigating this suit for ten (10) years.

j. Ronald A. Gross was hired in 1968. He was on the 1980 promotion list for Sergeant, on or before November 23, 1982. The defendant knew and was aware that the 1980 and 1982 promotion selection process resulted

in an adverse impact on black candidates and was discriminatory, and failed to take steps to lawfully remedy the discrimination. Instead, defendant knowingly and intentionally caused him to be promotion on March 8, 1985 improperly. He served as sergeant until April 1, 1985 when the promotion was declared void by the Court. As a result he suffered embarrassment, humiliation, mental distress and lost pay. He calculates the loss at $100,000.

Four others claim under him at $100,000 each.

k. Laura Samuels is a black female who was retaliated against for OHR testimony and threatened and resigned. She claims a loss of more than $20,000.

l. Rose Queen and Gregory Lee claim under Laura Samuels and in their own names at $20,000 each.

Four others claim under them at $20,000 each.

Although there is no rule that settlements benefit all class members equally, Kineade v. General Tire & Rubber

Co., 635 F.2d 501, 506 n5 (5th Cir. 1981), a disparate distribution excluding the named plaintiffs required careful judicial scrutiny into whether the settlement allocations is fair to excluded members of the class. Holmes v. Continental Can Co., 706 F .2d 1144 (11th Cir. 1983).

The rule that appellate courts "must have a basis for judging the exercise of the district judge's discretion." Cotton v. Hinton, 559 F.2d at 1330, applies to the instant case where this Court must have a basis for judging the exercise of the Special Master's discretion.

Proponents of class action settlements bear the burden of developing a record demonstrating that the settlement distribution is fair, reasonable and adequate. Neither the defendants nor the Special Master have sustained their burden.

Accordingly, the Hammon plaintiffs herewith, move the Court to modify the settlement, to restor the 1 Million

Dollars to the settlement fund and permit the 55 named plaintiffs and those who claim under them to receive monetary relief for their special claims and claims for retaliation.[14] lack of jurisdiction over both the Byrne Complaint and the Byrne motion to intervene have been moot since 1987. (See: Part II, supra, at p3, where the proposed Consent Decree at p.1., specifically states that no standing is provided therein that did not exist prior to standing.

We raise the issue of standing and mootness because said issues were raised formally before the Special Master, who refused to rule on said issues, and there is no record upon which to judge his discretion. We also suggest that the 1 Million Dollar reduction in the Hammon monetary compensation fund was a transfer to the creation of a Fourth Platoon, in Part Two of Consent Decree, Promotions at

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[14]Uncertainties in determining the amount of back pay due a class member should be resolved against the employer. (citations omitted) U.S. v. U.S. Steel Corp., 520 F.2d 1043 (5th Cir. 1975).

paragraph 7, 8, p.20. We submit that said action not only violated the Hammon/Byrne Joint Stipulation of October 2, 1989, but also inserts a purely Labor-Management issue into this litigation and settlement, which represents an abuse of discretion on the part of the Special Master and over which, we believe, the Court has no jurisdiction.[15]

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[15]The Hammon plaintiffs requested that promotion lists attached to Part B of the Special Master's Settlement Agreement contain race designations. Said request was ignored, however a race designated review of Schedules A, B and C are revealing. Under the settlement, of the 76 promotions to be made to Sergeant, only 26% are Black, 71% are White; of the 62 promotions (corrected for retirements) to Lieutenants, only 30% are Black, 69% are White. At the rank of Captain, (where we in 1985 pleadings noted the group of Black superachievers) 54% are Black and 45% are White. Of the total 171 promotions, 33% will go to Blacks or 57 and 66% will go to Whites or 112.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903 (CRR)
MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

SHARON PRATT KELLY, *et al.*,
Defendants

Civil Action No. 85-782 (CRR)
KEVIN MICHAEL BYRNE, *et al.*,
Plaintiffs,

v.

THEODORE R. COLEMAN, *et al.*,
Defendants

ORDER

[Filed April 2, 1992]

The Court is in receipt of an April 1, 1992 Motion for Reconsideration of Order Denying Emergency Petition for Writ of Mandamus and Motion for Stay filed by Joan A. Burt, Esq. on behalf of the Hammon class. The Court shall

treat the aforementioned Motion as a Motion for Reconsideration and for a Stay of the Order issued by the Court of Appeals for the District of Columbia Circuit on February 14, 1992. Upon consideration of the Motion for Reconsideration and for a Stay, and given this Court's finding that an emergency exists with respect to Ms. Burt's clients and other parties to this case requiring immediate action as per the Orders issued by this Court on March 31 and April 1, 1992, before the receipt of Ms. Burt's Motion, it is, by this Court, this 2nd day of April, 1992.

ORDERED that the Motion for Reconsideration and for a Stay shall be, and hereby is, DENIED for the reasons set forth in the Memorandum attached hereto.

/s/ CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

CC: Counsel served with Memorandum to the United States Court of Appeals this date.

/s/ CRR

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903 (CRR)

MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

MARION S. BARRY, *et al.*,
Defendants

Civil Action No. 85-782 (CRR)

KEVIN M. BYRNE, *et al.*,
Plaintiffs,

v.

THEODORE R. COLEMAN, *et al.*,
Defendants

PRE-FAIRNESS HEARING REPORT
OF SPECIAL MASTER

[Filed October 22, 1990]

I. Introduction

As the Court is aware, the parties agreed to a

settlement in August. A copy of the settlement is appended hereto as Appendix "A." That agreement contained "all essential terms" of a final resolution of all claims by the Hammon Class, the Byrne Class and Local 36, and all members thereof. This settlement was achieved after years of litigation and several efforts at settlement, including four months of efforts by the Special Master. At one point, the Court had the parties before it, and the Court made it clear that the parties should decide whether to agree upon the Special Master's recommended settlement, and all parties were given an opportunity to decide whether to accept the settlement. All parties did, counsel for all parties signed the agreement, and that agreement has remained undisturbed until this fairness hearing.

The settlement has been publicly disclosed. Notice has been provided to members of both classes through personal notice at firehouses throughout the District, through

publication notice in five publication, and through mail notice to some identifiable class members. Some class members has telephoned their counsel with questions and have sought advice. From the time of the settlement until this date, the parties, the Special Master and various officials of the City have spent an enormous number of hours in an effort to assure that the terms of the settlement are implemented. In this period, hundreds of firefighters have become confident that there will be promotional tests given in December, for the first time since 1984. Thus, firefighters, black and white, throughout the City are hopeful that the settlement will be approved and that the time, money and effort that have been invested since August will not have been invested in vain.

All parties understand, however, the Court's responsibility to assure that the settlement is fair and that the final settlement of these Rule 26 (b) (2) class actions is

approved only after the Court is satisfied that it represents a just resolution of the various claims that have been made by all parties. This report by the Special Master summarizes the parties' responses to the objections that have been filed by a number of individuals. It is the product of two meetings with counsel for the parties. Those meetings took place on October 16 and 17, 1990. Transcripts of the meetings should be on file with the Court. The parties concluded, and the Special Master concurs, that the objections contain no surprises and that the settlement fairly resolves all claims made by members of either the Hammon or Byrne Class.

But for one development, this report would have been in the Court's hands last week. It is necessary to describe this development before turning to the specific objections that have been filed. Since the settlement, the Special Master has worked with the parties to arrive at a consent decree for submission to the Court. After several drafts were circulated,

the Hammon Class indicated that it would sign the decree if one change were made. The Byrne Class and Local 36 accepted the change, as did the City, and both of these parties signed the decree. Although Ms. Burt, counsel for the Hammon Class, represented on several occasions that she would sign, she did not. At a meeting of all counsel with the Special master on October 16, 1990, Ms. Burt again represented--both to all other parties and the Special Master--that she would sign the consent decree. She did not. During the period in which Ms. Burt promised to sign and failed to do so, information emerged which suggested that Ms. Burt was seeking to have contact with a named defendant in this case despite full knowledge that he was represented by counsel and that counsel had indicated such contact was improper. The failure to sign and the information about improper contacts resulted in distraction and delay.

At the moment, there is a proposed consent decree

signed by the City and the Byrne Class and Local 36. It is the same decree which Ms. Burt represented as an officer of the Court that the Hammon Class approved and that she would sign. It remains unsigned by her, however. The absence of a proposed consent decree is, fortunately, irrelevant to the fairness hearing. During the settlement negotiations, the Special Master was well aware that in this litigation there were previous allegations that parties or their counsel had failed to live up to their bargains. For this reason, the Special Master provided in this draft settlement that it contained all essential terms. This meant that not a single additional term was required to satisfy any part, and that any additional terms consistent with the agreement that the Court might add by way of a decree would be satisfactory. Thus, the Court may formulate its own decree if it approves the settlement. Indeed, the Special Master intentionally omitted the word "consent" from the description

of the "decree" which is required under the settlement so that it would be clear that any decree which the Court formulated and which embraced the essential terms of the settlement would be satisfactory.

In view of the surprising and disappointing failure of Ms. Burt to adhere to her representations to the Court and to all counsel, the Special Master recommends that the Court approve the settlement, direct the parties to proceed to implement it without delay, and consider a decree to be recommended by the Special Master after the parties have an opportunity to be heard.[1] The Special Master believes that the specific terms of the consent decree was appropriate when all parties had committed to cooperation and to avoiding delay. This has not been the case with respect to the Hammon Class, and certain provisions of the consent

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[1]All parties have been on notice that, if they did not agree on a consent decree, the Special Master was prepared to recommend a decree to the Court.

decree may warrant reconsideration in light of the events that have transpired.[2]

II. Summary Analysis of Timely Objections[3]

The following summary identifies the objections that have been made. Some objections are on multiple grounds, and each ground is recorded. Thus, the total here exceeds the number of individuals who filed objections.

Objections to Compensation

1. To Amount of Compensation--1
2. To 1/1/80 Date--9

Objections to Promotions

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[2]The proposed consent decree signed by two parties is attached hereto as Appendix "B." Since all parties agreed to sign it, all parties agreed that the City would not pay any money into the special fund until the Court approved the settlement. In fairness to the City, it should not be faulted in the slightest for relying upon the representatives by Ms. Burt that she would sign the decree and that its provisions would govern the conduct of the parties.

[3]The cut-off date for objections was October 9, 1990. To assure that all objectors had an adequate opportunity to respond in writing, the Special Master did not receive from the Court any objections until October 13, 1990. This summary relates to those objections. Objections filed a week late or later are considered, infra.

1. To Extending 1984 Lists--16
2. To Eligibility or Details of New Tests--10
3. To Failing to Extend 1984 Lists Further--8
4. To Testing Fire Prevention Division--33
5. To Union Voting Procedures--6

Individual Objections

1. On Behalf of Families of Deceased--2
2. On Behalf of Retirees--2
3. On Idiosyncratic Grounds--7 (3, 9, 10, 16, 26, 34, 44)

Requests for Claim Forms or General Objections--10

The parties and the Special Master spent hours during the settlement negotiations and additional hours after the timely objections were received considering virtually all issues raised by the objections. The responses to the objections are set forth herein.

III. Responses to Objections

A. Objections to Compensation

There is only one objection to the amount of the compensation, and it is a general one. The total

compensation reflects a judgment by the parties that litigation would be expensive and would result in delay. The compensation is based upon recognition by both the Hammon Class and the City that waiver of the statute of limitations defense by the City for firefighters who were members of the fire department on 1/1/80 serves to recognize the deeply held feelings on the part of some black firefighters that they were the victims of widespread discrimination as well as the deeply held feelings on the part of some white firefighters that any discrimination took place in the past before they were in the fire department. The compensation agreement also recognizes the administrative finding of a problem with the 1990 hiring examination. The amounts of compensation set forth in the settlement reflect a fair judgment as to appropriate payments for the injuries which have been alleged.

There are some firefighters who will receive no

compensation because they were not members of the fire department on 1/1/80. The cut-off date was chosen on the ground that it is highly likely that any firefighter who left the department before this date would have had any claim for monetary relief barred by the statute of limitations prior to the filing of the class action lawsuit by the Hammon plaintiffs. It is possible, of course, that the statue might also bar some claims by person who were employed on 1/1/80, and it is probable that claims by persons employed on this date might have been time barred if they arose prior to 1/1/80. But, the City concluded that it was desirable to waive the statute of limitations for persons who had a colorable right to sue for damages on 1/1/80 and who might have received some monetary recover. The settlement avoids the need to determine precisely when particular acts occurred

and whether any acts had continuing effects.[4]

Although no general objection has been raised with respect to the post-1980 compensation, the parties respectively note that the focus on the 1980 hiring examination recognized the results of the administrative proceeding which found a problem with that test. The compensation scheme focuses on the average date on which white firefighters who took the exam were hired and provides a reasonable monetary remedy for every black applicant whether he was hired or not. The remedy is based on a reasonable compensatory amount for loss or personal disappointment for each month that no job offer was made to a black applicant until hiring from the 1980 test was complete.

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[4]It seems almost impossible that any person with a valid monetary claim prior to 1980 had been deprived of that claim It is very likely that the City's agreement to waive the statue for those persons employed on 1/1/80 will provide monetary relief beyond that which would have been available if the statute of limitations issues had been litigated. In exchange for waiving the statute, the City obtains the benefits of repose.

B. Objections to Promotions

There are objections to the settlement on several grounds relating to promotions. Some objectors complain that promotional lists based upon the 1984 promotional exams should not be used to fill vacancies that occurred after October 15, 1986, and before March 1, 1989, because those exams ordinarily are used to fill vacancies for only a two year period and that period expired on October 15, 1986. Some objectors complain that the list of promotions for vacancies to lieutenants positions arising between October 15, 1986 and March 1, 1989 contains names of persons who did not take an exam and who are promoted on the basis of seniority. Some objectors object that persons promoted have an opportunity to take another promotional exam in December rather than waiting a year in grade. Some objectors want to have more persons promoted immediately. Some union members object to the union voting procedure.

And, a number of fire prevention (as opposed to fire suppression) persons question the absence of a specific provision for a promotional examination that focuses exclusively on fire prevention.

The Byrne plaintiffs and Local 36 would have preferred no use of promotional lists for vacancies arising after October 15, 1986. They and the City agreed tot he extended lists, however, because they concluded that the Hammon challenge to the promotional exams would otherwise have to be litigated, thus delaying promotions further. Since the promotional lists are not race-based, they raise no question of racial discrimination or racial preference. The use of the lists provides promotions on the basis of past tests or seniority, and is an important aspect of the overall settlement.

Because the settlement provides for a new, fourth firefighting platoon, Local 36 and the Byrne plaintiffs

reasoned that new promotional opportunities are available for all firefighters. Thus, no firefighters is necessarily in a worse position with respect to opportunities to compete for promotion now than he or she would have been in where the promotional lists not extended.

As for the fact that person promoted under the settlement may take another exam for promotion in December, the parties understand that there is no way at this point to roll the clock back and to proceed as if there had been promotional exams in 1986 and 1988. At this point, no one has been promoted since 1986. The City has a need to fill spots, and the parties are desirous of settling the litigation. The use of two new promotional examinations, in combination with the use of extended promotional lists for vacancies that arose between October 15, 1986 and March 1, 1989 means that there will be immediate promotions and soon-to-be-given tests. There will also be a fourth platoon

that will provide new positions for which all may compete. The result is a settlement that avoids litigation, provides racially neutral promotions, and permits competition for additional vacancies provided by the settlement. It deprives no individual of any expectancy, and it permits the City to get back to a promotional exam system that will provide for promotional lists running for a two year period as soon as possible.

The Special Master directed the union to use a voting procedure that avoided the four or five week delay that mail notice of the settlement would have produced. In so doing, the Special Master asked for the same prompt union vote that the Court had previously requested in this litigation. The Union President and its counsel indicated that voting could take place within a week of a signed agreement, and the Special Master asked that this be accomplished. The agreement was widely circulated, and was even posted in

firehouses in the District. Thus, the Union and the other parties are convinced that all union members had a fair chance to be heard. This is especially true in view of the attention that the litigation had received over several years. The union membership was aware of settlement discussions, it was aware of the specific terms of the settlement, a vigorous debate took place, and the approval followed.

The objection by the members of the fire prevention part of the fire department has been the subject of much consideration by the Special Master and the parties. The Test Development Committee, which is preparing the first test under the settlement (scheduled for December), has unanimously concluded that it is only feasible to have single exam in place under the testing schedule called for by the settlement. The overwhelming number of vacancies are in fire suppression. Indeed, it is possible that only one vacancy will be available in fire prevention. The cost of separate

tests for sergeant, lieutenant and captain for fire prevention is high, and the vacancies are so low that the choice of a single examination to be given for all firefighters makes eminent sense at this time.

The City has agreed to consider the possibility of offering a separate examination for fire prevention personnel once the December exam has been given, and it is possible to determine the costs of a separate examination. It is important to recall that the firefighters who elected to serve in fire prevention made a voluntary choice and they did so knowing that the City generally gave only a single examination. The single examination assures that all firefighters are eligible for promotion to all vacancies in the City. Despite the historic practice of giving a single examination and the voluntary choice of fire prevention personnel to serve in fire prevention rather than fire suppression, the City has agreed to reserve the promotional

opportunity (or opportunities if more than one is available) in fire prevention while it considers the economic and practical feasibility of providing a new and separate examination for fire prevention.

Thus, at the moment, no fire prevention personnel are worse off than they would be without a settlement. They may compete for all promotional opportunities, and the City will determine whether it is feasible to administer a separate examination for fire prevention. They have been free to move from prevention to suppression and they will remain free to do so if a unitary examination is given.

C. Individual Objections

The first individual objection is to the failure of the settlement to provide explicitly for the heirs or estates of deceased firefighters who would have been entitled to a monetary remedy. The parties agreed that the estate or heirs should be able to receive the money that the firefighter would

have received. Thus, the parties will unanimously recommend to the Court that the claims form be amended to provide for a claim by the estate or heirs of deceased firefighters.

As for retired firefighters, they have no expectation of retroactive promotions. They decided to leave the department, to obtain retirement benefits, and to forego the risks as well as the benefits of this litigation. It is difficult to see how any retired firefighter is worse off under the settlement than he or she expected to be at the time of retirement. Those who did not retire assumed the risk that this litigation might have adversely affected their opportunities. To the extent that they receive any benefit under the settlement, it is a fair exchange for the risk assumed.

Finally, there are a number of individual claims, which have been characterized as idiosyncratic. Under this

settlement, all persons lose their individual claims, and the class obtains significant relief in terms of monetary compensation and future promotions and nondiscriminatory tests. No class settlement can possibly satisfy every single person. Some members of a class might receive slightly more than they might receive if they litigated separately, and some might receive somewhat less. Overall, however, this is a fair accommodation of the claims of historic segregation and the need for nondiscriminatory promotions and future tests.

A summary of the individual, timely objections is attached hereto as Appendix "C"[5]

IV. Nontimely Filings

Following the cut-off date for objections, the Court received requests for claims form from Frank Bass, Glenn Sterling, James L. Davis, Richard A. Young, Loney G.

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[5]Some objections were actually requests for claim forms. These are not addressed herein.

Goode, and Joseph Lee Cook. It also received objections from Spurgeon H. Burruss, Algie R. Lewis, and John E. Taylor. The first two objections relate to the 1/1/80 cut-off date and raise no new issues. The Taylor objection is to the extended promotional lists and eligibility for new examinations. These issues were raised by timely filed objections and are considered above.

RESPECTFULLY SUBMITTED,
/s/ STEPHEN A. SALTZBURG,
Special Master

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 91-7010
September Term 1991
CV 84-0903

Marvin Hammon, *et al.*,
Appellee,

v.

Joseph E. Smith, *et al.*,
Appellants.

BEFORE: Buckley, Sentelle and Henderson, Circuit Judges

ORDER

[Filed January 28, 1992]

Upon consideration of the petition for rehearing it is ORDERED that the petition be denied. Complainants who have severed the employment relationship cannot successfully assert a continuing violation. See, e.g., Laffey

v Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert denied, 434 U.S. 1086 (1978); Terry v. Bridgeport Brass Col, 519 F.2d 806, 808 (7th Cir. 1975; Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1234 (8th Cir. 1975). Moreover, because petitioners cannot successfully assert a continuing violation, they cannot benefit from the timely filing of their class representative.

Per Curiam
FOR THE COURT
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 91-7010
September Term 1991
CV 84-0903

Marvin Hammon, *et al.*,

Appellee

v.

Joseph E. Smith, *et al.*,

Appellants

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges.

ORDER

[Filed January 28, 1992]

Appellants' Suggestion for Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration

of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT
CONSTANCE L. DUPRE, CLERK

BY:
Robert A. Bonner
Deputy Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 91-7010
September Term 1990
CV 84-0903

Marvin Hammon, *et al.*,
Joseph L. Smith, *et al.*,
Appellants,

v.

Sharon Pratt Dixon, Mayor, *et al.*,

BEFORE: Buckley, Sentelle and Henderson, Circuit Judges.

ORDER

[Filed August 30, 1991]

Upon consideration of the motion to dismiss, or, in the alternative, for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance

be granted substantially for the reasons stated by the district court in its November 6, 1990 opinion. The merits of the parties' positions are so clear as to justify summary action. See Taxpayers Watchdog, Inc., v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903

MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

MARION S. BARRY, *et al.*,
Defendants

Civil Action No. 85-782

KEVIN M. BYRNE, *et al.*,
Plaintiffs

v.

THEODORE R. COLEMAN, *et al.*,
Defendants

DEFENDANTS' RESPONSE TO LETTER OF FEBRUARY 5, 1992 FROM NATHAN R. QUEEN REGARDING THE SPECIAL MASTER

[Filed February 28, 1992]

Defendants, by and through their counsel of record,

herein file their response to the February 5, 1992 letter from Nathan R. Queen, President, Progressive Fire Fighters Association (hereinafter referred to as the "Hammon plaintiffs"). This organization has indicated that it represents most of the African-American firefighters in the District of Columbia Fire Department (DCFD).

In his February 5th letter, Mr. Queen expresses concern over the continued involvement of the Special Master, Professor Stephen Saltzberg, in various aspects of the above-referenced consolidated cases. Mr. Queen contends that Professor Saltzberg's involvement is no longer needed and is counter-productive. In addition, Mr. Queen contends that the Special Master has been biased in favor of the union, Local 36, in issuing decision in this case.

As shown below, while defendants have not prevailed in most of the disputes in this case, defendants do not believe that the Special Master has exhibited bias in favor of or

against any particular party. In particular, defendants were deeply disappointed with the ruling on eligibility for the second round of promotional examinations for the DCFD. Even though the Special Master ruled against the defendants, the defendants do not contend that the Special Master is biased in favor of the union. The lack of bias is particularly seen in the detailed and careful manner used by Professor Saltzberg in resolving this dispute.

Prior to issuing his recommendation to the Court, the Special Master gave all parties several opportunities to brief and present evidence on the ;issue do who was eligible to take the second round of promotional examinations. Counsel for the Hammon plaintiffs refused to attend the June 26, 1991 hearing on eligibility.[1] Shortly after the June 26th hearing, the Special Master issued a decision adverse to that

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[1]At another hearing it is defendants' understanding that Ms. Burt simply got up and walked out of the hearing.

of the City and the Hammon plaintiffs. To ensure that the Hammon plaintiffs were not prejudiced by their counsel's failure to attend the hearing, the Special Master decided that same week to set aside his decision in the union's favor and conducted another hearing. The Hammon plaintiffs' counsel fully participated in this second hearing.[2] As such, while defendants are disappointed at the Special Master's ruling on the ;issue of eligibility, they do not share Mr. Queen's assertion that the Special Master is biased.

In addition, defendants do not believe it would be in the best interest of the African-American firefighters to have the Special Master removed. In fact, rather than undermining their interests, he is, in fact, protecting their

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[2]Defendants must note for the record that the Hammon plaintiffs' counsel walked out of the afternoon proceedings. After extensive discussion between the City, the Union, and the Special Master on how to proceed in counsel's absence, Ms. Burt walked back into the courtroom. Ironically, she then chastised everyone for spending so much time discussing how her departure from the courtroom impacted on the proceedings.

interests. For example, he is attempting to secure distribution of the settlement funds which the Court and the City eagerly seek. To the end, the Special Master has repeatedly sought the cooperation of the Hammon plaintiffs' counsel in verifying claims and resolving disputes between members of the Hammon plaintiffs' class over loans made to plaintiffs' counsel.[3] Ironically, this effort has been completely rebuffed by the Hammon plaintiffs' counsel. Similarly, the Hammon plaintiffs' counsel refused to cooperate in verifying standard claims made by the members of the class. To ensure that the ;rights of these claimants were protected, the Special Master had no option but to seek verification of the claims by the DCFD. For the sake of

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[3]A number of the Hammon plaintiffs contend that they made separate loans to Ms. Burt and that their loans should be compensated out of the $100,000.00 special fund. In addition, other claimants contend that the provided special services to counsel, or endured unique hardships, which they argue entitle them; to payments out of the special fund. It is defendants' understanding that the claims on the special fund far exceed the $100,000.00 available to pay these claims.

brevity, defendants will simply note that these examples are just a few in a long litany of failures on the part of Hammon plaintiffs' counsel to discharge her duties to her clients. The efforts of the Special Master in dealing patiently with Ms. Burt show that not only is the Special Master laboring diligently to expedite resolution of all remaining issues in this case but his continued presence is essential to protect the Hammon plaintiffs from the dilatory tactics of their own counsel.

Defendants note the Byrne plaintiffs have consistently argued the Hammon plaintiffs' interests have already been undermined by the conduct of the Hammon plaintiffs' own counsel. Defendants, on their part, are concerned over the consistent pattern of misinformation and misrepresentation communicated to the members of the Hammon class over (1) the reason the settlement funds have not been distributed, and (2) defendants' so-called hard-ball tactics in settling this case.

As to the distribution of the settlement funds, defendants have repeatedly indicated that they supported distribution once all claims had been verified (a process held up by the Hammon plaintiffs' own counsel who refused to verify the claims) and all appeals had been concluded (the Hammon plaintiffs themselves filed an appeal). Defendants have stated unequivocally that now that all appeals have been concluded and the non special fund claims verified that the settlement proceeds should be distributed -- immediately. As such, there is absolutely no basis for the Hammon plaintiffs falsely accusing the District, the Mayor, the Special Master or the Court of improperly delaying distribution of the settlement funds.

As the settlement of this case, defendants wish to set the record straight. Defendants note that they offers 4.54 million dollars to separately settle this case with the Hammon plaintiffs (without the involvement of the union). The

defendants' offer was rejected solely because defendant would not sign an agreement specifying that the Hammon plaintiffs' counsel, Ms. Burt, Esq., would get a pre-determined fee (e.g., one proposal required payment of attorney's fees in excess of one million dollars). In response, the defendant offered to keep the 4.5 million dollar settlement offer on the table with the Court being allowed to resolve the issue of attorney's fees. The Hammon plaintiffs' counsel rejected that offer and again insisted that the 4.5 million dollar offer by accompanied by an agreement paying counsel more than one million dollars in attorney's fees. The defendants balked at such a ridiculous maneuver and withdrew their settlement. Later, when settlement discussion were renewed, defendants negotiated a settlement for 3.5 million.[4]

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[4]Defendants also note that prior to the final settlement agreement settlement which the Court has approved the District and the Hammon plaintiffs agreed on another settlement proposal. That proposal was scuttled in Court by ;Ms. Burt when she produced a new proported

In summary, defendants do not join in any claim that the Special Master is biased against the Progressives or biased in favor of Local 36. Moreover, defendants do not believe that it would be in the best interests of the parties (particularly the Hammon plaintiffs) for the Court to remove the Special Master at this crucial time period.

JOHN PAYTON
Corporation Counsel, D.C.
MARTIN L. GROSSMAN
Deputy Corporation Counsel, D.C.
Civil Division

/s/ George C. Valentine
Assistant Corporation Counsel
Rm. 322 District Bldg.
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20002
(202) 727-6340
Counsel for defendants

28 February 1992

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settlement document which no one at the Corporation Counsel, including the Corporation Counsel, the late Dr. Herbert O. Reid, Sr., had ever seen. That new document contained terms which were materially different from the terms int he settlement document to which the City had agreed.

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903

MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

SHARON PRATT KELLY, *et al.*,
Defendants

Civil Action No. 85-782

KEVIN M. BYRNE, *et al.*,
Plaintiffs

v.

THEODORE R. COLEMAN, *et al.*,
Defendants

ORDER

[Filed April 2, 1992]

Upon consideration of the Motion of Joseph Smith, et al., to vacate the November 6, 1990 Settlement Agreement

and Decree in the above-captioned cases, and based upon the representations of Joan A. Burt, counsel for the Hammon class, Jeremiah Collins and the law firm of Bredhoff and Kaiser, counsel for Local Union 36 and the Byrne Plaintiffs, and George A. Valentine, counsel for the District of Columbia, that the Mr. Smith and the putative class of firefighters who retired from the District of Columbia Fire Department on or before January 1, 1980 lack standing to challenge the settlement agreement and the Court's Decree, and it appearing that time to file a Motion to Vacate or Set Aside Judgment pursuant to Fed. R. Civ. P. 60 has expired, and because the Motion of Mr. Smith is otherwise lacking in merit, it is, by this Court, this 31 day of March, 1992,

ORDERED that the Motion of Joseph Smith, et al., to Vacate the November 6, 1990 Settlement Agreement and Decree shall be, and hereby is, DENIED.

/s/CHARLES R. RICHEY
UNITED STATES DISTRICT COURT

CONSENT:

/s/George A. Valentine, Esq.
Counsel for the District of Columbia

/s/Jeremiah Collins, Esq.
Counsel for Local 36 and the Byrne Plaintiffs

/s/Joan A. Burt, Esq.
Counsel for the Hammon Class

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903

MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

MARION S. BARRY, *et al.*,
Defendants

Civil Action No. 85-782

KEVIN M. BYRNE, *et al.*,
Plaintiffs

v.

THEODORE R. COLEMAN, *et al.*,
Defendants

CONSENT DECREE

[Filed October 1990]

Preliminary Statement

The parties request that the Court approve this Decree

which is divided into two parts plus this preliminary statement. Each paragraph of this Decree is consistent with the settlement agreement signed by the parties, which explicitly stated that it contained all essential terms of the settlement.

The parties join in requesting approval provided that the Court approves the substance of both parts of the Decree. The division into parts recognizes the different interests of the Hammon and Byrne classes in their respective suits. The parties do not intend by joining in a single decree to provide standing that did not exist prior to the settlement. For example, the Byrne plaintiffs' standing exists with respect to promotions, not hiring. But, the joint nature of the decree recognizes that the settlement agreement explicitly provided that its separate parts must both be approved simultaneously for the settlement to be effective.

The Decree in its totality resolves all claims of racial

discrimination, whether or not asserted in the litigation, and all existing disputes among the Hammon plaintiffs, the Byrne plaintiffs, and the defendants as to racial discrimination in hiring, promotion and other Fire Department practices and omissions. The Hammon and Byrne plaintiffs expressly waive any and all claims to further relief and shall initiate no further proceedings with respect to racial discrimination in hiring, promotion or other Fire Department practices or omissions, except those proceeding explicitly permitted herein. The parties agree that remedial actions and practices required or permitted by this Decree shall not constitute unlawful discrimination under any law, regulation, or constitutional provision. All parties shall assist in defending against any challenge to this Consent Decree and against any litigation filed contrary to the terms of this Decree.

The parties also agree that no promotions made pursuant to Part Two of this Decree may be made until the

$3,500,000 which the City must pay in Part One has been placed in a special fund and the Special Master has certified that such has been done. The parties further agree that there shall be no appeals from this Decree, unless explicitly provided for in the Decree.

This Consent Decree shall remain in effect for three years from the date of its approval. Upon expiration of the three year period, the Decree shall expire on its own without any further motion by the parties. Should all events contemplated by this Decree occur prior to the expiration of three years, any party may move the Court for an order that the Decree should be deemed to have expired, and the Court may so order.

DATED:

/unsigned/Joan Burt Hammon Class	/s/George Cohen Byrne Class & Local 36	/s/Dr. Herbert Reid D.C. Corporation Counsel

PART ONE OF CONSENT DECREE: HIRING AND RELATED ISSUES

I. BACKGROUND

1. Marvin K. Hammon, et al., hereinafter collectively referred to as the "Hammon plaintiffs," filed this action in March, 1984 against the Mayor of the District of Columbia, the D.C. Office of Personnel, and the D.C. Fire Department, hereinafter collectively referred to as "the defendants." The Hammon plaintiffs sought, inter alia, declaratory and injunctive relief. On January 9, 1986, Marvin K. Hammon and ten individual plaintiffs, on their own behalf and on behalf of all persons similarly situated, and the Progressive Fire Fighters Association on behalf of past uniform employees and members of the Association, filed an amended complaint, alleging inter alia that the defendants engaged in a pattern and practice of racial discrimination in the terms and conditions of employment against blacks in violation of federal civil rights statutes and

the United States Constitution.

2. Following the filing of the Hammon suit, the Hammon plaintiffs and the defendants requested that this Court approve a consent Decree which required the defendants to validate an entry level firefighter examination and to submit a proposed affirmative action plan.

3. In January, 1985, defendants promulgated an affirmative action plan calling for the consideration of race in making promotions, and defendants made five promotions pursuant to the plan. On March 8, 1985, Kevin M. Byrne, et al. filed an action challenging those provisions of the affirmative action plan. The Byrne complaint alleged that the short-term promotion provisions of the affirmative action plan violated federal civil rights laws and the United States Constitution, and the complaint requested, inter alia, that the five promotions made pursuant to the plan be revoked. Local 36, representing the firefighters in the District of

Columbia, was granted leave to intervene in the Hammon case.

4. On March 11, 1985, the United States filed a complaint alleging that the short-term hiring and promotion provisions of the affirmative action plan violated federal civil rights laws and the United States Constitution.

5. Ruling on summary judgment motions, this Court, in an order and memorandum opinion entered on April 1, 1985, upheld the affirmative action plan with respect to hiring, but not with respect to promotions. See Hammon v. Barry, 606 F. Supp. 1082. The United States Court of Appeals for the District of Columbia reversed as to hiring, which was the only issue decided on appeal from the District Court's order. See 813 F.2d 412 (D.C. Cir.), rehearing denied, 826 F.2d 73 (D.C. Cir. 1987), cert. denied, 486 U.S. 1036 (1988).

6. On remand to this Court, the Hammon

plaintiffs, the Byrne plaintiffs and the defendants sought to achieve a settlement of the issues involved in the case. The United States was no longer a party. On April 17, 1990, the District Court appointed a Special Master to work with the parties to achieve a settlement. This consent Decree is the product of the extensive discussions that the parties have had under the supervision of the Special Master.

7. In accordance with Rule 23 of the Federal Rules of Civil Procedure, the Court has determined that the Hammon plaintiffs represent a class composed of black uniformed employees of the District of Columbia Fire Department and applicants for employment therein, past, present and future. For purposes of settlement and entry of this Decree only, the Court makes a final certification of the class.

8. Part One of this Decree represents an effort by the parties (a) to provide appropriate compensation for

persons who might have been injured as a result of hiring tests which are alleged to be insufficiently job-related and to have had an adverse impact on a racially identifiable group, and (b) to provide remedies for any vestiges of discrimination which might have adversely affected the members of the Hammon Class.

9. There is in the record evidence to support the Hammon Class's claim of a history of segregation in the District of Columbia Fire Department that lasted many years. Even after segregation in assignments was abolished, there is evidence in the record to support the claim that segregation within quarters and working conditions may have continued. Formal segregation surely ended, however, in the 1960's, and the exact dates when various aspects of alleged discrimination began, continued and/or ended are disputed. There is also evidence that in recent years, the defendants have mad efforts to assure that the Fire Department does not

discriminate against any racial, gender or other group, although the parties dispute the extent to which these efforts have been successful. The parties agree that the sensitive issues in this case involve determinations of who can fairly claim to have been injured as a result of past events, what remedy are such persons entitled to, and how can such a remedy be fashioned without unfairly injuring third parties who were not participants in any past acts leading to the relevant injuries.

10. The defendants expressly deny that they are currently engaged in a pattern and practice of discrimination against blacks as alleged by the Hammon plaintiffs. They recognize, however, the evidence that exists concerning the alleged history of discrimination and the evidence that exists concerning test results with respect to hiring that are set forth in paragraph 13, infra. The Hammon plaintiffs recognize that defendants and intervenors dispute their claims on the

merits, and that, but for this agreement, the defendants might raise statutes of limitations and other defenses. The Hammon plaintiffs, the Byrne plaintiffs, and the defendants are desirous of avoiding the burden, delay, expense and uncertainty of further contested litigation. In the interest of public safety and the protection of the community as well as the protection of the public purse, and in a manner which will minimize the dislocation of all members of the Fire Department and serve to maintain the integrity of the public safety units contained within the Department for the purpose of fulfilling the emergency and preventive needs of the District of Columbia, the parties have agreed and consented to the entry of this Decree and to the waiver of all further proceedings except as specified herein. By entering into this Consent Decree, the defendants do not thereby admit any violations of law, rule or regulation, and defendants reserve the right to deny any violation of law, rule or regulation in

any other proceeding or in any other tribunal. The Hammon Class, although settling all claims, does not admit the validity of any practice of the defendants with respect to employment.

11. This Decree, the parties agree and the Court finds, represents a reasonable resolution of all claims of past injury and is an efficient way of moving forward toward future hirings and promotions that are nondiscriminatory.

12. Part One of this Decree resolves all existing disputes among the Hammon plaintiffs and defendants as to hiring and related issues, defined as all claims of racial discrimination in hiring or employment other than promotions, which are covered by Part Two of the Decree. No further proceedings shall be initiated by the Hammon Class with respect to hiring or any related issue with respect to any event that occurred prior to the entry of this Decree. This Decree resolves all claims of racial discrimination that were brought or that might have been brought by the

Hammon Class. No member of the Hammon Class shall hereafter be permitted to claim racial discrimination in employment with the Fire Department with respect to any event occurring prior to the date the Court approves the Decree or any matter explicitly provided for in this Decree.

13. This Court previously found that the 1980 hiring examination would produce an adverse impact on blacks if the results were used to select in rank order. An administrative determination in 1983 found that the 1980 hiring examinations had not been validated as a predictor of job performance. Defendants agree that there is evidence that supports the Hammon claim that this and prior, similar hiring examinations might have discriminated against blacks.

14. Defendants agree that it is appropriate to provide a monetary remedy for members of the Hammon Class who were employed by the Fire Department between 1962-1979 and who claim that they were victims of

discrimination in hiring or employment conditions, and to members of the Hammon Class who took the 1980 hiring examination and were either hired or not hired thereafter. Defendants also agree that members of the Class who made substantial contributions to the success of the Class on their own time should be entitled to compensation for the efforts they made on behalf of the Class.

II. MONETARY COMPENSATORY REMEDIES

15. The City shall pay the Hammon Class $3,500,000 in settlement of all claims covered by this Decree. This is the total amount to be paid to the Hammon Class or any member thereof by the City, except for attorney's fees and costs which may be awarded by the Court. The Hammon Class shall be responsible for any administrative costs of distributing the funds and shall seek no further monetary compensation from the City or any part thereof. Within 10 days of the court's approval of this

Decree, the City shall place $3,500,000 in a separate special fund in a local banking institution which will be recommended by the Hammon plaintiffs and approved by the Special Master. At the Hammon Class' request, the Special Master has agreed to consider the Industrial Bank of Washington, but will assure that whatever bank is chosen is free of any conflict of interest, is secure, and is able to provide appropriate interest on the funds deposited. No disbursements form this fund may be made without the approval of the Special Master.

Pre-1980 Compensation

16. Of the $3,500,000, $2,400,000 is allocated to all members of the Hammon Class who were employed by the Fire Department on January 1, 1980, and who file claim forms alleging that they were victims of racial discrimination in employment. Each member of the class who was employed by the Fire Department on that date and who files

a timely claim form shall receive compensation for each year from 1962-1979 in which he or she served as a member of the Department. The compensation will be allocated as follows: (a) 70% of the total amount is allocated to the years 1962-1968, (b) 20% of the total amount is allocated to the years 1969-1972, and (c) 10% of the total amount is allocated to the years 1973-1979.

17. Under paragraph 16, $1,680,000 will be allocated to the years 1962-1968, $480,000 to the years 1969-1972, and $240,000 to the years ; 1973-1979.

18. Allocation of these sums will be made as follows: The amount allocated to each of the three periods will be divided by the total number of firefighter years of the eligible members of the Hammon class. For example, if 50 eligible firefighters each worked all seven years form 1962-1967, the total number of work years would be 600 (50 x 7 = 350, + 50 x 5 = 250). The $1,680,000 would be

divided by 600, and the figure of $2800 per work year would be used as the basis for awarding this portion of the pre-1980 award. An identical process would be used for the periods, 1969-1972, and 1973-1979. The total award for any firefighter eligible for the pre-1980 damages would be based on the total of the work year figures for the three periods in which injury is claimed.

19. In addition to the $2,400,000, an additional sum may be available to be paid as additional damages for the years 1962-1968, as provided in paragraphs 23 and 25, infra. If any such sum is available, it will be divided by the total work years for this period, and a resulting award for eligible firefighters will be made as a supplementary payment.

Post-1980 Claims

20. The total amount available for compensation for post-1980 claims is $1,000,000. This amount will be

distributed as stated in paragraphs 21, 22, and 23 infra.

21. Any member of the Hammon Class who completed the 1980 hiring examination and who was hired by the Fire Department will receive the following upon submission of a timely claims form: $150 per month for each month between July 1, 1982 and the actual date of employment as a firefighter.

22. Each member of the Hammon class who completed the 1980 hiring examination and was never hired by the Fire Department will receive the following upon submission of a timely claims form: $100 per month for each month between July 1, 1982, and the date when the City notified the class member that a position as a firefighter was available. The total paid to these class members pursuant to this paragraph shall not exceed $500,000.

23. Should the total amount of the payments made pursuant to paragraphs 21 and 22 by less than $1,000,000,

the remainder shall be used to pay supplemental damages for pre-1980 claims for the years 1962-1968, as provided in paragraph 19, supra.

24. The remedial relief, which was ordered as a result of the administrative proceedings preceding this litigation in Fire Department Special Order No. 38, dated July 26, 1984, shall be provided and shall remain in full force and effect in the future.

Litigation Contributions

25. A total of $100,000 shall be set aside to compensate individual members of the Hammon class for service rendered in this litigation on their own time. Any member of the Hammon class may submit a claim to the Special Master indicating the hours worked, the service rendered, and the amount claimed. The Special Master shall award an appropriate amount to any such claimant at the rate of $23 per hour. The Hammon plaintiffs may seek to

identify special burdens borne by individual plaintiffs during this litigation, and portions of the $100,000 may be allocated as compensation for these burdens. Before any special burdens are compensated, the Special Master must find that they are identifiable and supported by the record, and that efforts have been made to assure that all members who have borne these burdens have been able to make a claim. Should the total amount of the distributions made pursuant to this paragraph be less than $100,000, the remainder shall be used to pay supplemental damages for pre-1980 claims for the years 1962-1968, as provided in paragraph 19, supra.

26. The Hammon plaintiffs will propose a schedule of payments and supporting rationales for any payment, including payments for services rendered on an hourly basis, which the Special Master will approve under a reasonableness standard.

III. ADMINISTRATION OF FUNDS

27. Neither the City nor the Byrne plaintiffs shall have any control over or right to participate in the determination of compensation under this Decree. The Special Master shall determine the amount to be awarded to individual claimants under this Decree, and his decision shall be final. The Special Master shall assure conditions that he believes are reasonably necessary to preserve the security of the $3,500,000, to provide assurance that the money will be properly handled, and as provide in paragraph 30, infra, to assure an accounting from time to time upon application.

28. In deciding the amount of compensation due any member of the Hammon Class, the Special Master shall have the authority to require the parties to this Decree or employees or officers to produce relevant information--e.g., the date on which a letter was sent by the City to a person who took the 1980 hiring test, or as to the years that a person was actually employed by the Fire Department.

29. The Hammon Class shall provide for the administrative expenses, including any fee of the Special Master allocated by court order to the Hammon class, from the interest accruing in the Special Fund.

30. The City shall have the right to request an accounting from the Special Master of funds expended from time to time and a final accounting when the compensation has been providing to all claimants.

31. The Court approves the claims form attached to this Decree as Appendix "A". This form shall be distributed to all class members who are current employees of the Fire Department, and to all persons who file a request for form and response to mail, published or personal notice. All claim forms must be received by the Court on or before November 30, 1990. Only members who file timely claims forms may receive compensation, although all members of the class are bound by the provisions of this Decree.

IV. NATURE IF INJURIES

32. The compensation provided herein is to settle claims of racial discrimination and to compensate for injuries alleged to have resulted therefrom.

V. ATTORNEYS FEES

33. Within ten days of the entry of this Decree, the City shall pay $150,000 as interim attorneys fees to counsel for the Hammon class. The parties agree that the Hammon class is a prevailing party to a significant extent and is entitled to apply for costs and reasonable attorneys fees as a prevailing party. This initial payment of fees will assist counsel for the class in carrying out their remaining responsibilities under this Decree. The $150,000 will be set off against the total fees to be awarded in this case. Costs do not include the Special Masters fees, which have been dealt with in separate court orders.

34. Within 30 days of the entry of this Decree,

unless the period is extended upon written application to the Special Master, counsel for the Hammon Class shall submit any applications they may have with respect to attorney's fees. The Special Master shall work with all counsel and the defendants in an effort to arrive at an agreement on fees to be paid. If the parties are unable to reach agreement, the Special Master shall make findings and recommendation to the Court, and the Court shall decide the amount of fees to be awarded.

35. No attorney's fees shall be awarded with respect to claims made for compensation under this Decree.

36. The Court finds that the Hammon Class counsel have adequately represented the class in this complex and protracted case, and have adequately considered the various and competing interests in arriving at a settlement that is fair to the class and that has produced a substantial recovery for its members.

VI. PRIVACY RIGHTS

37. The Special Master will approve all payments made pursuant to the provisions set forth above, and the total amounts paid are, by the nature of this document, public. Except for disclosures that are required of the District under law, each member of the Hammon class shall have the right to protect the fact that he or she received payment and the amount of any payment from public disclosure, and said information shall be placed under seal by the Special Master.

VII. TIMING

38. No promotions pursuant to Part Two of this Decree may be made until the $3,500,000 has been set aside in a fund, as described in paragraph 15, supra.

VIII. DURATION AND FINALITY

39. The parties explicitly incorporate by reference all matters referred to in the preliminary statement in this Decree.

DATED:

/unsigned/Joan Burt
Hammon Class

/s/Dr. Herbert Reid
Corporation Counsel
The District of Columbia

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 84-903 (CRR)
Civil Action No. 85-782 (CRR)

MARVIN K. HAMMON, *et al.*,
Plaintiffs

v.

MARION S. BARRY, *et al.*,
Defendants

SPECIAL MASTER'S REPORT ON POSSIBLE CONFLICTS OF INTEREST

[Filed February 21, 1992]

The Special Master indicated to the Court that some claimants who are seeking to recover a portion of the $100,000 special fund for litigation contributions or special burdens have sought to recover what appear to be loans or advances to Ms. Burt and/or other counsel. Ms. Burt seems to deny that she has any obligations for repayment of

attorney's fees to claimants. But, she has a copy of all of the claim forms and knows that a number of claimants have requested reimbursement for the attorney's fees they paid.[1]

Attached to the copy of this Report delivered to chambers are a couple of the claim forms that originally caused the Special Master to be concerned. One states that it was "my understanding that I would be reimbursed for monetary donation given to case." This claimant was hired in 1982. Another claimant asks for compensation because he gave at least $200 to Joan Burt for support during the case.[2] It is also true that other claimants seek reimbursement of money paid to Howard Moore, another attorney. A sample claim form is attached.

As long ago as September 4, 1991, the Special Master wrote Ms. Burt to invite her to provide information essential

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[1] Most claimants do not indicate the attorney to whom money was given.

[2] This claimant specifically refers to Ms. Burt.

to resolution of the claims made on the Special Fund. A copy of the Special Master's letter is attached. There was no reply. Unable to obtain any help from Ms. Burt, the Special Master distributed a Notice, a copy of which is also attached, to all claimants seeking to recover from the special fund. This Notice invited the claimants to submit any additional information with respect to their special claims. Some additional clarifying information was provided and has been shared with Ms. Burt.

The response by some claimants to the Notice raised yet another possible conflicts problem. Several claimants responded by saying that they had given "a power of attorney" to Ms. Burt to "fully represent all of my claims and rights." Samples are provided in the in-chambers copy of this Report and have been previously provided to Ms. Burt.[3]

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[3] The power of attorney issue has arisen before. When Lt.

At this time, the bulk of the money, $3,400,000, can be distributed according to the formula set forth in the settlement and approved by the Court's Decree and Order. Under the formula, the amounts are awarded without the need for teamster-style hearings and without any claimant competing against any other claimant. The $100,000 special fund is different; it pits claimants against each other, because there are claims for far more than $100,000 made. Thus, some choices will have to be made as to how to allocate that interest among competing individual claimants.

In view of the fact that there are conflicts among claimants for the special fund and potential conflicts as to any interest that will remain, two conflicts questions arise: (1) Is counsel for the class in a conflict of interest with claimants who seek reimbursement of attorney's fees, since

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Williams hired counsel, his counsel disclosed to the Court a circulation to class members from Ms. Burt seeking powers of attorney. This is part of the Court file.

any fees reimbursed from the special fund or from the interest would not have to be reimbursed from attorney's fees awarded in the case?[4] (2) Is counsel for the class in a conflict when she has powers of attorney on behalf of some particular individuals and these individuals are competing for limited funds against others who have chosen not to give a power of attorney?

The Special Master believes he is obliged to identify these issues for the Court, particularly because there is no counsel other than Ms. Burt who has seen the claim forms. With this information, the Court is in a position to decide whether the appearance of a conflict requires action.

DATED: February 21, 1992

/s/Stephen A. Saltzburg
Special Master

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[4] This question is most sharply raised in situations in which claimants seek reimbursement of fees paid to Ms. Burt, but it also is raised with respect to fees paid to other counsel who represented the class or its members. Any money distributed from the special fund or the interest to repay attorney's fees means that the attorneys do not have to make payments from fees received.